

1997

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18 Berkeley J. Emp. & Lab. L. 56

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He Said, He Said: Same-Sex Sexual Harassment Under Title VII and the “Reasonable Heterosexual” Standard

E. Gary Spitko*

Under current sexual harassment law, the trier of fact in a same-sex sexual harassment lawsuit is likely to judge the alleged behavior of a gay sexual harassment defendant more harshly than it would judge the identical behavior in a context where the defendant was not of the same sex as the plaintiff. This bias to a gay sexual harassment defendant arises because the “reasonable person” constructed by the trier of fact in evaluating whether an alleged act of hostile environment sexual harassment should be actionable is, under the author’s theory, a non-gay person with a heterosexual world view. The bias the author identifies exemplifies a common manifestation of such heterosexism: an activity that is condoned or even valued when engaged in by a non-gay person is condemned when engaged in by a gay person.

One means for alleviating this bias is for courts to refuse to recognize a cause of action under Title VII for same-sex sexual harassment. This result would be consistent with the refusal of federal courts to apply the “but-for” or “differences” theory of sex discrimination to recognize that sexual orientation discrimination is sex discrimination. Courts have justified their refusal to recognize a cause of action for sexual orientation discrimination under Title VII’s sex discrimination prohibition by arguing that Congress has not shown an intent to specifically proscribe sexual orientation discrimination. These courts should apply such a “negative inference” principle across the spectrum of sex discrimination cases and also refuse to proscribe same-sex sexual harassment because Congress has not shown any intent to make such behavior actionable under Title VII. An alternate means for alleviating the heterosexual bias that also recognizes the utility of having a remedy under Title VII for same-sex sexual harassment is for courts to instruct the trier of fact in a same-sex sexual harassment lawsuit to evaluate the actions of the defendant in the hypothetical context of a mixed-sex interaction. Thus, the gay supervisor who has commented on his

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© Berkeley Journal of Employment and Labor Law, Volume 18, No. 1, 1997.

male subordinate's physical appearance, in theory, would be judged as though he had commented on the appearance of a female subordinate.

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"We must conquer AIDS before it affects the heterosexual population."¹

I

INTRODUCTION AND OVERVIEW

During the 1970's, sexual harassment by men of working women began to be understood as an unacceptable barrier to the full and equal participation of women in the work force.² Soon after, courts started to recognize a cause of action under Title VII of the Civil Rights Act of 1964 to redress injuries arising from sexual harassment.³ This sexual harassment cause of action is a judicially constructed tort; neither the text nor the legislative

1. Margaret Heckler, U.S. Secretary of Health and Human Services in the Reagan Administration, quoted in LEIGH W. RUTLEDGE, *THE GAY DECADES* 239 (1992).

2. See CATHARINE A. MACKINNON, *THE SEXUAL HARASSMENT OF WORKING WOMEN* 27 (1979).

3. See, e.g., *Barnes v. Costle*, 561 F.2d 983 (D.C. Cir. 1977); *Williams v. Saxbe*, 413 F. Supp. 654 (D.D.C. 1976).

history of Title VII expressly proscribes, or even mentions, sexual harassment.⁴

To this day, owing to the lack of any specific textual or historical reference, the exact parameters of actionable sexual harassment under Title VII remain undefined.⁵ As recently as 1994, a deep split began to develop within the federal courts concerning whether Title VII proscribes sexual harassment when the putative victim and the alleged harasser are both of the same sex.⁶ In this unresolved debate, no one has discussed the effect that recognition of a Title VII cause of action for same-sex sexual harassment is likely to have on gay people. This Article speaks to that issue.

State tort law provides an alternate, albeit more difficult, means of redress for injuries arising from same-sex sexual harassment.⁷ The availability of these state tort remedies, however, does not make moot the debate over recognition of a cause of action for same-sex sexual harassment under Title VII. The common law tort that plaintiffs most frequently utilize to seek redress for alleged sexual harassment is intentional infliction of emotional distress.⁸ A plaintiff alleging intentional infliction of emotional distress, however, must demonstrate that the defendant engaged in extreme tortious behavior in excess of that needed to demonstrate a *prima facie* case of sexual harassment under Title VII.⁹

4. See RICHARD A. EPSTEIN, *FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS* 357 (1992) ("There seems to be something of a stretch [in finding sexual harassment actionable under Title VII] on the matter of statutory construction."); Theodore F. Claypoole, Comment, *Inadequacies in Civil Rights Law: The Need for Sexual Harassment Legislation*, 48 OHIO ST. L.J. 1151, 1160 (1987) (stating that the federal judiciary has created a cause of action for sexual harassment "where none previously existed").

5. See *Vinson v. Taylor*, 760 F.2d 1330, 1333 n.7 (D.C. Cir. 1985) (Bork, J., dissenting) ("Perhaps some of the doctrinal difficulty in this area is due to the awkwardness of classifying sexual advances as 'discrimination.'"); Kenneth L. Pollack, *Introduction: Current Issues In Sexual Harassment Law*, 48 VAND. L. REV. 1009, 1014 (1995) (listing splits of court authority relating to the standards for holding an employer liable for the sexually harassing behavior of its manager, for weighing the reasonableness of a putative victim's perception that her environment was hostile to her on the basis of her gender, and for admitting evidence concerning a sexual harassment plaintiff's past sexual conduct).

6. See *infra* Part II.B.

7. See Epstein, *supra* note 4, at 352-53 (pointing out that "[t]he common law does not take harassment lightly" and illustrating how assault and battery, insult, offensive battery, intentional infliction of emotional distress by extreme and outrageous conduct, and invasion of privacy can remedy allegedly sexually harassing behavior); MACKINNON, *supra* note 2, at 159 ("[M]any of the acts that comprise incidents of sexual harassment, if properly construed. . . , arguably fit into the traditional torts of assault and battery, with corollary dignitary harm, or, if sufficiently extreme, the tort of intentional infliction of emotional distress").

8. BARBARA L. SCHLEI & PAUL GROSSMAN, *EMPLOYMENT DISCRIMINATION (FIVE-YEAR CUMULATIVE SUPPLEMENT)* 155 (1989).

9. *McKee v. Ram Prods.*, No. 92-CV-481, 1993 U.S. Dist. LEXIS 7346 (W.D. Mich. Apr. 23, 1993) (granting summary judgment on claim of intentional infliction of emotional distress because co-employee's use of profane language, including referring to women as "bitches," was not extreme or outrageous; moreover, victim's stress was not sufficiently severe); *Bailey v. Unocal Corp.*, 700 F. Supp. 396, 400 (N.D. Ill. 1988) (holding that employer's "electing not to learn" of supervisor's alleged repeated sexual advances and exposing of himself to plaintiff was not sufficiently extreme or outrageous to state cause of action for intentional infliction of emotional distress); *Bowersox v. P.H. Glatfelter Co.*,

Moreover, in approximately half of the states, a workers' compensation statute provides the exclusive remedy for state tort claims asserted by alleged victims of sexual harassment.¹⁰ Workers' compensation statutes do not similarly preempt remedies available under Title VII.¹¹ The preemption by workers' compensation laws of state tort remedies is important because an employer's potential liability under the workers' compensation scheme generally is significantly less than its potential liability under state tort law or Title VII.¹² Most importantly, unlike Title VII and state tort laws, workers' compensation laws do not allow for the recovery of either compensatory or punitive damages.¹³

Part II of this Article begins with an examination of the reasoning used by courts to support judicial recognition of a cause of action for mixed-sex sexual harassment. Part II then discusses the two distinct theories of discrimination that Professor Catharine MacKinnon sets forth in her influential argument that sexual harassment is within the purview of Title VII's "sex" discrimination prohibition. Under MacKinnon's "differences theory," which is concerned only with disparate treatment that is based on "arbitrary" or overgeneralized distinctions, sexual harassment is sex discrimination because it "differentially injures one gender—defined group in a sphere—sexuality in employment—in which the treatment of women and men can be compared."¹⁴ Under MacKinnon's "inequality theory," which treats as discriminatory any employment practice that disadvantages any particular social group, sexual harassment is sex discrimination because it

677 F. Supp. 307, 311 (M.D. Pa. 1988) (finding that sexually explicit remarks and display of sexually explicit materials were not sufficiently extreme or outrageous conduct to support a claim of intentional infliction of emotional distress).

10. See, e.g., *Lui v. Intercontinental Hotel Corp.*, 634 F. Supp. 684, 688 (D. Haw. 1986) (holding that workers' compensation scheme covers a female employee's alleged sexual assault and battery at the hands of a supervisor during her working hours); *Associates Corp. v. Smithley*, 621 N.E.2d 1116, 1120-21 (Ind. Ct. App. 1993) (holding that exclusivity provision of Indiana's Workers' Compensation Act bars negligent retention claim); *Dickert v. Metropolitan Life Ins. Co.*, 428 S.E.2d 700, 701 (S.C. 1993) (deciding that South Carolina Workers' Compensation Act is an exclusive remedy and bars claims against employer for negligence, breach of contract, invasion of privacy, and infliction of emotional distress); *Byers v. Labor & Indus. Review Comm'n*, 547 N.W.2d 788, 791 (Wis. Ct. App. 1996) (holding that workers' compensation scheme is the exclusive remedy whenever injuries arising from sexual harassment would entitle the employee to workers' compensation benefits); Jane Byeff Korn, *The Fungible Woman and Other Myths of Sexual Harassment*, 67 *TULANE L. REV.* 1363, 1379-80 & n.94 (1993) (noting that states are about evenly split on the question of whether a workers' compensation scheme bars tort recovery and listing a sampling of state decisions). But see *Bennett v. Furr's Cafeterias, Inc.*, 549 F. Supp. 887, 890 (D. Colo. 1982) (holding that employee's alleged sexual assault and harassment by supervisor did not result from risks inherent in her employment; thus, common law claims are not barred by Colorado's Workmen's Compensation Act).

11. See *Bernstein v. Aetna Life & Cas.*, 843 F.2d 359, 364-65 (9th Cir. 1988).

12. See Korn, *supra* note 10 at 1368-69 (noting that employers have sought refuge under workers' compensation statutes from tort claims relating to alleged sexual harassment because their liability is significantly less under the workers' compensation scheme).

13. *Id.* at 1369.

14. *MACKINNON*, *supra* note 2 at 7.

perpetuates the social inequality of women by degrading and objectifying women *qua* women.¹⁵

Part II continues with a discussion of the split within the federal courts over recognition of a cause of action for same-sex sexual harassment. This Part concludes that the split results from courts applying one or the other of MacKinnon's two theories of discrimination. Those courts that have implicitly followed MacKinnon's differences theory have recognized a cause of action for same-sex sexual harassment. On the other hand, courts that have implicitly accepted MacKinnon's inequality theory have refused to recognize such a cause of action. Part II goes on to demonstrate that MacKinnon's inequality theory of sex discrimination does not apply in the context of same-sex sexual harassment because such harassment does not send a message of gender inferiority.

Part II argues that courts should not apply the differences theory to justify recognition of a cause of action for same-sex sexual harassment because courts have refused to apply the differences approach in litigation under Title VII challenging sexual orientation discrimination. An inconsistent application of the differences theory to support a cause of action for same-sex sexual harassment would provide an incentive to the rational employer to employ a non-gay person over a comparable gay candidate. This incentive would be created because an employer's liability for an act of same-sex sexual harassment is likely to exceed an employer's liability for an equivalent act of mixed-sex sexual harassment.

Part III argues that any given alleged act of sexual harassment will be judged more harshly when the actions complained of involve same-sex interactions rather than mixed-sex interactions. This conclusion follows from the heterosexual nature of the facially neutral standard that the trier of fact uses to judge whether allegedly sexually harassing behavior is sufficiently offensive to be actionable.¹⁶

15. *Id.*

16. This Article employs the term "heterosexist" as Gregory Herek has defined it: "a world-view, a value system that prizes heterosexuality, assumes it is the only appropriate manifestation of love and sexuality, and devalues homosexuality and all that is not heterosexual." Gregory M. Herek, *The Social Psychology of Homophobia: Toward a Practical Theory*, 14 N.Y.U. REV. L. & SOC. CHANGE 923, 925 (1986). This Article gives a broader meaning to the words Herek used, however, than Herek himself seems to have intended. Herek points out that the term "homophobia," which technically means fear of sameness, is an inadequate designation for anti-gay prejudice because "it unjustifiably narrows our understanding of anti-lesbian and anti-gay prejudice to a single dimension of fear, and . . . presumes such prejudice to be irrational." *Id.* at 924-25. However, Herek seems to conceive of "heterosexism" as being distinct from "homophobia." "While homophobia involves active fear and loathing of homosexuality, heterosexism wishes away lesbian and gay people or assumes that they never really existed." *Id.* at 925. To the contrary, this Article employs the term "heterosexism" to encompass the active ill will that Herek ascribes to "homophobia." Heterosexism, then, is seen as one manifestation of homophobia. See also Wayne R. Dynes, *Heterosexuality*, 1 ENCYCLOPEDIA OF HOMOSEXUALITY 532, 534-35 (Wayne R. Dynes ed., 1990) (defining heterosexism as the "excessive prizing or favoring of heterosexual persons and values"); I. Bennett Capers, Note, *Sex(ual Orientation) and Title VII*, 91 COLUM. L. REV. 1158, 1159 (1991) (stating that heterosexism "refers to institutional valorization of heterosexual activity").

Finally, Part IV proposes steps that the courts should take to ameliorate the anti-gay effects that result when they recognize a cause of action for same-sex sexual harassment. Most importantly, courts should attempt to eliminate the heterosexual bias inherent in the sexual harassment standard by instructing the finder of fact to evaluate the actions of a gay same-sex sexual harassment defendant in the hypothetical context of a mixed-sex interaction.

II

THEORIES OF ACTIONABLE SEXUAL HARASSMENT APPLIED IN THE SAME-SEX CONTEXT

A. *Judicial Construction of a Cause of Action Under Title VII for Sexual Harassment*

Under Title VII of the Civil Rights Act of 1964, it is "an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin."¹⁷ Title VII does not, however, expressly proscribe "sexual harassment" or disparate treatment based on sexual attractions, sexual relationships, or receptivity to sexual propositions.

For example, under the majority view, Title VII does not encompass a claim of disparate treatment arising from a manager's hiring of his paramour rather than her more qualified competitor, even if the manager's hiring decision is based entirely on his sexual involvement.¹⁸ According to this view, a male who is denied an employment opportunity that is instead preferentially awarded to the decision maker's paramour is not prejudiced because of his sex. Rather, he is prejudiced only because the decision maker preferred his paramour. As the Court of Appeals for the Second Circuit reasoned in *DeCintio v. Westchester County Medical Center*,¹⁹ the rejected male applicant "faced exactly the same predicament as that faced by any woman applicant for the promotion: [n]o one but [the paramour]

17. 42 U.S.C. § 2000e-2(a)(1) (1988 & Supp. V 1993).

18. See *DeCintio v. Westchester County Med. Ctr.*, 807 F.2d 304, 306-08 (2d Cir. 1986), *cert. denied*, 484 U.S. 965 (1987) (Under Title VII, the phrase "discrimination on the basis of sex" does not encompass a "disparate treatment [claim by one not in a romantic relationship with the decision maker] premised . . . on a romantic relationship between an employer and a person preferentially hired."); *Miller v. Aluminum Co. of Am.*, 679 F. Supp. 495, 501 (W.D. Pa. 1988) ("Male employees in [the female plaintiff's] work place shared with her the same disadvantage relative to [the supervisor's paramour]: none could claim the special place in [the supervisor's] heart that [his paramour] occupied."); *Proksel v. Gattis*, 49 Cal. Rptr. 2d 322 (1996) (holding that preferential treatment for a paramour is not actionable). *But see* *Broderick v. Ruder*, 685 F. Supp. 1269, 1277 (D.D.C. 1988) ("Title VII is . . . violated when an employer affords preferential treatment to female employees who submit to sexual advances . . . and such conduct is a matter of common knowledge."); *Priest v. Rotary*, 634 F. Supp. 571, 581 (N.D. Cal. 1986) (same).

19. 807 F.2d at 306-08.

could be considered for the appointment because of [the paramour's] special relationship to [the decision maker]."²⁰

In theory, the rationale of *DeCintio* should lead courts to conclude that a woman who is denied an employment opportunity because of her refusal to submit to the decision maker's sexual demands is not prejudiced because of her sex. Rather, she is prejudiced because of her "special relationship" to the decision maker. All other female applicants, from whom the decision maker has not demanded sexual favors, stand on equal footing with any male applicant, to whom the decision maker presumably is not even sexually attracted, for the employment opportunity.

Settled case law, however, is to the contrary. "Quid pro quo" sexual harassment—"in which submission to sexual conduct is made a condition of concrete employment benefits"²¹—violates Title VII's proscription of sex discrimination.²² The seminal quid pro quo sexual harassment case is *Barnes v. Costle*.²³ The female plaintiff in *Barnes* alleged that her employer had eliminated her job in retaliation for her refusal to grant sexual favors to her male supervisor and that this adverse action "would not have occurred but for her sex."²⁴ Granting summary judgment to the employer, the district court reasoned:

The substance of [the plaintiff's] complaint is that she was discriminated against, not because she was a woman, but because she refused to engage in a sexual affair with her supervisor. . . . Regardless of how inexcusable the conduct of [the plaintiff's] supervisor might have been, it does not evidence an arbitrary barrier to continued employment based on [the plaintiff's] sex.²⁵

The Court of Appeals for the District of Columbia Circuit, however, reversed the district court's grant of summary judgment.²⁶ The appeals court found that the plaintiff had been subjected to an arbitrary barrier to continued employment "because she was a woman"²⁷ since "retention of her job was conditioned upon submission to sexual relations—an exaction which the supervisor would not have sought from any male."²⁸ The appeals court grounded its *Barnes* holding on the principal that disparate treatment

20. *Id.* at 308.

21. *Jones v. Commander, Kansas Army Ammunitions Plant*, 147 F.R.D. 248, 250 (D. Kan. 1993); see also *MACKINNON*, *supra* note 2, at 32.

22. See *Tomkins v. Public Serv. Elec. & Gas Co.*, 568 F.2d 1044, 1048-49 (3d Cir. 1977); *Barnes v. Costle*, 561 F.2d 983, 989-90 (D.C. Cir. 1977); *Garber v. Saxon Bus. Prods.*, 552 F.2d 1032, 1032 (4th Cir. 1977) (*per curiam*); *Williams v. Saxbe*, 413 F. Supp. 654, 659 (D.D.C. 1976), *rev'd in part and vacated in part*, 587 F.2d 1240 (D.C. Cir. 1978).

23. 561 F.2d 983 (D.C. Cir. 1977).

24. *Id.* at 985.

25. *Id.* at 986.

26. *Id.* at 984.

27. *Id.* at 990.

28. *Id.* at 989.

in employment need not be founded solely on gender to violate Title VII.²⁹ “[I]t is enough that gender is a factor contributing to the discrimination in a substantial way.”³⁰

A second variety of sexual harassment that courts have held actionable under Title VII is “hostile environment” harassment where gender-based harassment “is a persistent *condition of work*.”³¹ Such harassment, in order to be actionable, “must be sufficiently severe or pervasive ‘to alter the conditions of [the victim’s] employment and create an abusive working environment.’”³² Unlike a plaintiff alleging quid pro quo sexual harassment, however, the victim of alleged environmental harassment need not suffer an economic detriment to state a cause of action for sex discrimination under Title VII.³³ Moreover, properly understood, hostile environment sexual harassment need not even be sexual in nature.³⁴

The theory of environmental harassment first gained judicial acceptance in *Rogers v. EEOC*,³⁵ a case involving a claim of national origin discrimination. The plaintiff in *Rogers* alleged that her employer discriminated against her on the basis of her Hispanic origin when it discriminated against its Hispanic clients.³⁶ The Court of Appeals for the Fifth Circuit rejected the employer’s argument that the alleged discrimination was not an unlawful “employment practice” because the alleged discrimination was directed at its clients and not its employees. Instead, the court

29. *Id.* at 991.

30. *Id.* at 990. The *Barnes* court cited to *Phillips v. Martin Marietta Corp.*, 400 U.S. 542, 544 (1971), in which the Supreme Court held that an employer’s policy of refusing to employ mothers of pre-school-age children was prima facie sex discrimination within the purview of Title VII when the employer did employ fathers of pre-school-age children.

31. *MacKinnon*, *supra* note 2, at 32 (original emphasis). *MacKinnon* argues that quid pro quo harassment and environmental harassment merge since “tolerate it or leave” is an implicit condition in environmental harassment. *Id.* at 46. See also *Meritor Sav. Bank v. Vinson*, 477 U.S. 57 (1986).

32. *Meritor*, 477 U.S. at 67 (quoting *Henson v. Dundee*, 682 F.2d 897, 904 (11th Cir. 1982)).

33. See *Meritor*, 477 U.S. at 67-68; *Henson*, 682 F.2d at 901 (“[U]nder certain circumstances the creation of an offensive or hostile work environment due to sexual harassment can violate Title VII irrespective of whether the complainant suffers a tangible job detriment.”); *Bundy v. Jackson*, 641 F.2d 934, 945 (D.C. Cir. 1981) (arguing that “sexual harassment, which injects the most demeaning sexual stereotypes into the general work environment and which always represents an intentional assault on an individual’s innermost privacy” violates Title VII even if the victim is not deprived of a “tangible job benefit”).

34. See Joshua F. Thorpe, Note, *Gender-Based Harassment and the Hostile Work Environment*, 1990 DUKE L.J. 1361, 1363-64 (arguing that “all forms of gender discrimination that affect an employee’s work environment are potentially actionable under Title VII without regard to whether they arise from sexual motives”) (original emphasis). See also *Hall v. Gus Constr. Co.*, 842 F.2d 1010, 1014 (8th Cir. 1988) (stating that “the predicate acts underlying a sexual harassment claim need not be sexual in nature”); *Bell v. Crackin Good Bakers, Inc.*, 777 F.2d 1497, 1503 (11th Cir. 1985) (holding that sexual harassment claimant is “under no obligation to adduce proof of sexual advances, requests for sexual favors, or other verbal or physical conduct of a sexual nature”) (internal quotations omitted); *Fox v. Sierra Dev. Co.*, 876 F. Supp. 1169, 1173 (D. Nev. 1995) (finding that non-sexual, gender-oriented harassment is actionable as sexual harassment).

35. 454 F.2d 234 (5th Cir. 1971), *cert. denied*, 406 U.S. 957 (1972).

36. *Id.* at 237.

reasoned that “the relationship between an employee and his working environment is of such significance as to be entitled to statutory protection” under Title VII.³⁷ Fourteen years later, the Supreme Court held that “a plaintiff may establish a violation of Title VII by proving that discrimination based on sex has created a hostile or abusive working environment.”³⁸ The Court adopted the reasoning of *Rogers*:

The phrase ‘terms, conditions or privileges of employment’ in [Title VII] is an expansive concept which sweeps within its protective ambit the practice of creating a working environment heavily charged with . . . discrimination [based on a protected category]. One can readily envision working environments so heavily polluted with discrimination as to destroy completely the emotional and psychological stability of minority group workers³⁹

It is readily apparent that discrimination against clients according to their national origin is discrimination *on the basis of* national origin, even if such a practice arguably is not an employment practice. However, it is less apparent how sexual harassment as it is popularly understood—that is, the imposition of unwanted sexual commentary and advances—fits within Title VII’s prohibition of discrimination *on the basis of* “sex.” “Unlike sex discrimination in its other forms, sexual harassment involves not just gender, but also the sexual characteristics which the harasser is attracted to (in a quid pro quo case) or is seeking to exploit in some offensive way (in a hostile work environment case).”⁴⁰

In her 1979 book “Sexual Harassment of Working Women,” Professor Catherine MacKinnon sets forth what are perhaps the most influential arguments for bringing sexual harassment within the meaning of the “sex” discrimination prohibition in Title VII.⁴¹ MacKinnon presents two distinct

37. *Id.* at 237-38.

38. *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 66 (1986).

39. *Id.* (quoting *Rogers*, 454 F.2d at 238).

40. Samuel A. Marcossan, *Harassment on the Basis of Sexual Orientation: A Claim of Sex Discrimination Under Title VII*, 81 GEO. L.J. 1, 32-33 (1992).

41. MACKINNON, *supra* note 2. See, e.g., *Drinkwater v. Union Carbide Corp.*, 904 F.2d 853, 861 n.15 (3d Cir. 1990) (citing to MacKinnon’s theory that “women’s sexuality largely defines women as women in this society, so violations of it are abuses of women as women,” as the basis for hostile environment sexual harassment claims); *Bundy v. Jackson*, 641 F.2d 934, 945-46 (D.C. Cir. 1981) (citing to MacKinnon in holding that a woman need not allege that she has suffered an economic detriment to state a claim for sexual harassment); *Turley v. Union Carbide Corp.*, 618 F. Supp. 1438, 1441 (S.D.W. Va. 1985) (adopting MacKinnon’s definition of quid pro quo sexual harassment as “the unwanted imposition of sexual requirements in the context of a relationship of unequal power”); *Moire v. Temple Univ. Sch. of Med.*, 613 F. Supp. 1360, 1366 (E.D. Pa. 1985) (same), *aff’d*, 800 F.2d 1136 (3d Cir. 1986). See also Mary Anne C. Case, *Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence*, 105 YALE L.J. 1, 83 n.275 (noting that MacKinnon is “one of those responsible for [the] development” of the sexual harassment cause of action); Carolyn Grose, *Same-Sex Sexual Harassment: Subverting the Heterosexist Paradigm of Title VII*, 7 YALE J.L. & FEMINISM 375, 379, 398 (1995) (labeling “sexual harassment theory” as “the quintessential feminist legal creation” and lauding MacKinnon’s argument that sexual harassment is a form of sex discrimination as “one of the most significant contributions made by feminist jurisprudence to mainstream legal thought”).

theories of how sexual harassment is discrimination on the basis of sex: the “differences theory” and the “inequality theory.”⁴²

Under the differences approach, only disparate treatment that is “arbitrary” or based on overgeneralized or inaccurate distinctions between the sexes is proscribed.⁴³ Thus, under the differences approach, men and women must be treated similarly in employment unless a biological difference between the sexes justifies disparate treatment.⁴⁴

The inequality approach treats as discriminatory any rule or employment practice that disadvantages a particular social group.⁴⁵ “In this view, the prohibition on sex discrimination aims to eliminate the social inferiority of one sex to the other [and] to dismantle the social structure that maintains [that inferiority.]”⁴⁶

Central to MacKinnon’s argument that both the differences theory and the inequality theory support recognition of a cause of action under Title VII for sexual harassment is her notion that women “occupy a structurally inferior as well as distinct place” in society and in the work place.⁴⁷ MacKinnon describes a work force that is segregated by gender both horizontally and vertically, which makes women systematically vulnerable to sexual harassment.⁴⁸ In MacKinnon’s view, the work force is segregated horizontally since a large majority of working women work in jobs that are “for women”—that is, jobs that relatively few men also perform.⁴⁹ The work force is segregated vertically because, regardless of what job a woman performs, she is likely to be subordinate to men in the work place.⁵⁰

This structural inferiority of women in the work place is the critical link between sexual harassment and sex discrimination because it suggests that men are able to sexually harass women *because* they are women; it is the sexual harassment victim’s female gender that has placed her in the position of powerlessness that makes possible the sexual harassment.⁵¹ Thus, “an analysis of the abuse as structural [demonstrates that sexual harassment merits] legal attention as sex discrimination, not just as unfairness between two individuals, which might better be approached through private law.”⁵²

Within this framework, both the differences theory and the inequality theory support an argument that sexual harassment is sex discrimination.

42. MACKINNON, *supra* note 2, at 4.

43. *Id.* at 4, 101.

44. *Id.* at 110.

45. *Id.* at 116-17.

46. *Id.* at 103.

47. *Id.* at 2.

48. *Id.* at 9-10.

49. *Id.* at 10-11.

50. *Id.* at 9, 12.

51. *Id.* at 27.

52. *Id.*

“Under the differences approach, sexual harassment is sex discrimination *per se* because the practice differentially injures one gender-defined group in a sphere—sexuality in employment—in which the treatment of women and men can be compared.”⁵³ When a supervisor or co-worker sexually harasses only female employees, women are treated unequally as they must meet sexual demands or endure sexual commentary that similarly situated men do not.⁵⁴

Under the inequality theory, sexual harassment is sex discrimination because it perpetuates the social inequality of women by degrading and objectifying women *qua* women.⁵⁵ “Sexual harassment makes of women’s sexuality a badge of female servitude.”⁵⁶ MacKinnon has described three ways in which this is so:

Women are sexually harassed by men because they are women, that is, because of the social meaning of female sexuality, here, in the employment context. . . . [F]irst, the exchange of sex for survival has historically assured women’s economic dependence and inferiority as well as sexual availability to men. Second, sexual harassment expresses the male sex-role pattern of coercive sexual initiation toward women, often in vicious and unwanted ways. Third, women’s sexuality largely defines women as women in this society, so violations of it are abuses of women as women.⁵⁷

B. The Split over Application of Professor MacKinnon’s Theories of Discrimination and the Resulting Split over Recognition of a Cause of Action for Same-Sex Sexual Harassment

Federal courts have split sharply over whether Title VII provides a cause of action for sexual harassment when the claimed victim is of the same sex as the alleged harasser. This split mirrors, and largely results from, a split over which of MacKinnon’s theories of discrimination the courts have implicitly accepted.

Those courts that have recognized a cause of action for same-sex sexual harassment have adopted a “but-for” analysis: same-sex sexual harassment is sex discrimination under this view because, but for the victim’s sex, he would not have been sexually harassed. Without express acknowledgement, and perhaps unwittingly, these courts have adopted a theory that is comparable to MacKinnon’s differences theory. On the other hand, the courts that have refused to recognize a cause of action for same-sex sexual harassment, for the most part, have reasoned that same-sex sexual harassment is not actionable because the practice does not degrade the victim on

53. *Id.* at 6 (original emphasis).

54. *Id.*

55. *Id.* at 7.

56. *Id.* at 189.

57. *Id.* at 174.

the basis of his or her sex. This rationale parallels MacKinnon's inequality approach.

The earliest case recognizing a cause of action under Title VII for same-sex sexual harassment is *Wright v. Methodist Youth Services, Inc.*⁵⁸ In *Wright*, a male plaintiff alleged that his employment had been terminated because he had rejected the sexual advances of his male supervisor.⁵⁹ The court held that the plaintiff had stated a cause of action under Title VII.⁶⁰ The court based its decision on cases upholding a female employee's right to recover under Title VII after her employment had been terminated because she had refused the sexual advances of her male supervisor. "Those holdings are predicated on the notion that making a demand of a female employee that would not be made of a male employee involves sex discrimination."⁶¹ The court held that the plaintiff's claim was "the obverse of that coin—an alleged demand of a male employee that would not be directed to a female."⁶²

58. 511 F. Supp. 307 (N.D. Ill. 1981).

59. *Id.* at 309-10.

60. *Id.* at 310.

61. *Id.*

62. *Id.* (citing *Bundy v. Jackson*, 641 F.2d 934, 942 (D.C. Cir. 1981) (stating that "discrimination is sex discrimination whenever sex is for no legitimate reason a substantial factor in the discrimination") (original emphasis)). Under the but-for theory of sexual harassment, harassing behavior by a bisexual or "equal opportunity" harasser is not actionable because the plaintiff cannot demonstrate "that but for the fact of her sex, she would not have been the object of harassment." *Henson v. City of Dundee*, 682 F.2d 897, 904 (11th Cir. 1982). When the harasser victimizes employees of both sexes, "the sexual harassment would not be based upon sex because men and women are accorded like treatment." *Id.* See also *Rabidue v. Osceola Ref. Co.*, 805 F.2d 611, 620 (6th Cir. 1986) ("It is of significance to note that instances of complained of sexual conduct that prove equally offensive to male and female workers would not support a Title VII sexual harassment charge because both men and women were accorded like treatment."), *aff'd*, 805 F.2d 611 (6th Cir. 1986), *cert. denied*, 481 U.S. 1041 (1987); *Bundy*, 641 F.2d at 942 n.7 ("Only by a reductio ad absurdum could we imagine a case of harassment that is not sex discrimination—where a bisexual supervisor harasses men and women alike."); *Barnes v. Costle*, 561 F.2d 983, 990 n.55 (D.C. Cir. 1977) ("[When] a bisexual superior . . . conditions the employment opportunities of a subordinate of either gender upon participation in a sexual affair . . . the insistence upon sexual favors would not constitute gender discrimination because it would apply to male and female employees alike."); *MACKINNON*, *supra* note 2, at 203 ("By the logic of the differences argument, if a sexual condition of employment were imposed equally upon both women and men by the same employer, the practice would no longer constitute sex discrimination because it would not be properly based on the gender difference.").

But see *Steiner v. Showboat Operating Co.*, 25 F.3d 1459, 1462-64 (9th Cir. 1994), *cert. denied*, 115 S. Ct. 733 (1995) (finding that the fact that a supervisor was verbally abusive to both men and women was not a defense to a female subordinate's claim of sexual harassment where the supervisor's abuse of women differed from his abuse of men in that the former was of a sexual and gender-specific nature); *Chiapuzio v. BLT Operating Corp.*, 826 F. Supp. 1334, 1337 (D. Wyo. 1993) ("[E]qual harassment of both genders does not escape the purview of Title VII[:] Where a harasser violates both men and women, 'it is not unthinkable to argue that each individual who is harassed is being treated badly because of gender.'") (internal citation omitted).

For a thoughtful proposal to eliminate the "bisexual harasser" defense, see Sandra Levitsky, Note, *Footnote 55: Closing the 'Bisexual Defense' Loophole in Title VII Sexual Harassment Cases*, 80 MINN. L. REV. 1013, 1044 (1996) (arguing for a "dominance" theory of sexual harassment that would proscribe any harassment that "reinforce[s] sexual hierarchy by taking advantage of the sex object stereotype").

In accordance with *Wright*, courts that have recognized a cause of action under Title VII for same-sex sexual harassment, and that have provided a rationale for their holding, almost uniformly have reasoned that such harassment is sex discrimination within the purview of Title VII because the alleged victim would not have been harassed "but for" his sex.⁶³

63. See *Quick v. Donaldson Co.*, 90 F.3d 1372, 1378 (8th Cir. 1996) (determining that "the key inquiry is whether 'members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed'" (quoting *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 25 (1993)); *Johnson v. Hondo, Inc.*, No. 95-C-866, 1996 U.S. Dist. LEXIS 13876, at *15 (E.D. Wis. Sept. 9, 1996); *Shermer v. Illinois Dept. of Transp.*, No. 95-3231, 1996 U.S. Dist. LEXIS, at *4 (C.D. Ill. August 30, 1996); *Gerd v. United Parcel Serv., Inc.*, No. 96-B-6, 1996 U.S. Dist. LEXIS 12180, at *10 (D. Colo. August 19, 1996) ("The determinative inquiry is solely whether the conduct is sexual in nature and 'whether the sexual harassment would have occurred but for the gender of the victim.'") (quoting *Williams v. District of Columbia*, 916 F. Supp. 1, 7 (D.D.C. 1996)); *Swage v. The Inn Philadelphia*, No. 96-2380, 1996 U.S. Dist. LEXIS 8795, at *9-10 (E.D. Pa. June 21, 1996); *Williams v. District of Columbia*, No. 94-02727, 1996 U.S. Dist. LEXIS 1338, at *20 (D.D.C. Feb. 5, 1996) (holding that "the determinative question is not the orientation of the harasser, but whether the sexual harassment would have occurred but for the gender of the victim"); *Tanner v. Prima Donna Resorts, Inc.*, No. 95-00619, 1996 U.S. Dist. LEXIS 3078, at *11 (D. Nev. Jan. 23, 1996); *Tietgen v. Brown's Westminster Motors, Inc.*, 921 F. Supp. 1495, 1501-02 (E.D. Va. 1996); *Sardinia v. Dellwood Foods, Inc.*, No. 94-5458, 1995 U.S. Dist. LEXIS 16073, at *17-18 (S.D.N.Y. Oct. 30, 1995); *Roe v. K-Mart Corp.*, No. 93-2372, 1995 U.S. Dist. LEXIS 18211, at *3-4 (D.S.C. March 28, 1995); *King v. M.R. Brown, Inc.*, 911 F. Supp. 161, 167 (E.D. Pa. 1995) (siding with those courts that have recognized a cause of action for same-sex sexual harassment because "if the plaintiff had been a member of the opposite sex, he or she would not have been harassed"); *Easton v. Crossland Mortgage Corp.*, 905 F. Supp. 1368, 1382 (C.D. Cal. 1995); *Ecklund v. Fuisz Technology, Ltd.*, 905 F. Supp. 335, 339 (E.D. Va. 1995) ("To maintain [a same-sex] sexual harassment claim, a plaintiff must show that 'but for' the plaintiff's sex, the plaintiff would not have been subject to harassment."); *Plakio v. Congregational Home, Inc.*, 902 F. Supp. 1383, 1392 (D. Kan. 1995) ("Simply put, Title VII prohibits . . . gender harassment . . . when the victim can prove it would not have occurred but for the victim's gender."); *Raney v. District of Columbia*, 892 F. Supp. 283, 288 (D.D.C. 1995); *Nogueras v. University of Puerto Rico*, 890 F. Supp. 60, 63 (D.P.R. 1995); *Vandeventer v. Wabash Nat'l Corp.*, 887 F. Supp. 1178, 1181 (N.D. Ind. 1995); *Griffith v. Keystone Steel & Wire*, 887 F. Supp. 1133, 1135-37 (C.D. Ill. 1995); *EEOC v. Walden Book Co.*, 885 F. Supp. 1100, 1103-04 (M.D. Tenn. 1995); *Prescott v. Independent Life & Accident Ins. Co.*, 878 F. Supp. 1545, 1550-51 (M.D. Ala. 1995) ("When a homosexual man propositions or harasses a male subordinate, but does not similarly proposition or harass female workers, the male employee has been singled out because of his gender. But for his being male, the harassment would not have occurred."); *McCoy v. Johnson Controls World Servs., Inc.*, 878 F. Supp. 229, 232 (S.D. Ga. 1995); *Boyd v. Vonnahmen*, 67 Fair Empl. Prac. Cas. (BNA) 1769, 1770 (1995); *Pritchett v. Sizeler Real Estate Management Co.*, 67 Fair Empl. Prac. Cas. (BNA) 1377, 1379 (E.D. La. 1995) ("Same gender harassment is clearly a form of gender discrimination because 'but for' the gender of the subordinate, she would not have been subjected to the harassment."). Cf. *Fredette v. BVP Management Assoc.*, 905 F. Supp. 1034, 1037-38 (M.D. Fla. 1995) (stating that "the determinative factor is that the discrimination or harassment would not have occurred 'but for the fact of [the plaintiff's] sex'" but holding that the instant alleged harassment was not actionable because it "stemmed not from the fact that [plaintiff] was a man, but rather from the fact that [he] refused the [male] manager's propositions and did not share the same sexual orientation or preferences as the manager").

Few published opinions recognizing a cause of action for same-sex sexual harassment have provided a rationale other than the "but-for" rationale in support of that holding. See *Peric v. University of Illinois*, No. 96-C-2354, U.S. Dist. LEXIS 13042, at *4-5 (N.D. Ill. Sept. 4, 1996) ("The statute is clearly worded in gender neutral terms, and no legislative history exists to contradict a gender neutral reading."); *Blozis v. Mike Raisor Ford, Inc.*, 896 F. Supp. 805, 806-07 (N.D. Ind. 1995) (holding that male employee may show actionable sexual harassment under Title VII by demonstrating that sexually explicit comments and behavior by his male co-workers created an anti-male atmosphere); *Ton v. Infor-*

The leading case holding that same-sex sexual harassment is not actionable under Title VII is *Goluszek v. Smith*.⁶⁴ In *Goluszek*, the male plaintiff alleged that his male supervisor and male co-workers had subjected him to verbal harassment of a sexual nature⁶⁵ and that his male co-workers physically assaulted him by poking him in the buttocks with a stick.⁶⁶

Holding that "the defendant's conduct was not the type of conduct Congress intended to sanction when it enacted Title VII," the court reasoned:

The "sexual harassment" that is actionable under Title VII "is the exploitation of a powerful position to impose sexual demands or pressures on an unwilling but less powerful person." . . . Actionable sexual-harassment fosters a sense of degradation in the victim by attacking their sexuality. . . . In effect, the offender is saying by words or actions that the victim is inferior because of the victim's sex.⁶⁷

The court found that the plaintiff "was a male in a male-dominated environment."⁶⁸ Thus, although the plaintiff "may have been harassed 'because' he is a male . . . that harassment was not of a kind which created an anti-male environment in the work place."⁶⁹ Courts have widely followed *Goluszek's* reasoning.⁷⁰

mation Resources, Inc., 70 Fair Empl. Prac. Cas. (BNA) 355, 359-60 (N.D. Ill. 1996) (reasoning that same-sex sexual harassment is actionable under Title VII because (1) nothing in the legislative history of Title VII suggests that same-sex sexual harassment is not prohibited and (2) "reverse race-discrimination" has been held actionable under Title VII).

Finally, some courts recognizing same-sex sexual harassment have not provided any rationale for their holdings. See, e.g., *Showalter v. Allison Reed Group, Inc.*, 767 F. Supp. 1205, 1211-13 (D.R.I. 1991) (finding that male supervisor subjected two male subordinates to both quid pro quo and environmental sexual harassment); *Joyner v. AAA Cooper Transp.*, 597 F. Supp. 537, 541 (M.D. Ala. 1983) (concluding without discussion that Title VII proscribes "unwelcomed homosexual harassment"); *Barlow v. Northwestern Mem'l Hosp.*, 30 Fair Empl. Prac. Cas. (BNA) 223, 224 (N.D. Ill. 1980) (holding that female plaintiff who alleged that she was demoted because she had refused her female supervisor's sexual demands stated a cause of action under Title VII).

64. 697 F. Supp. 1452 (N.D. Ill. 1988).

65. The plaintiff alleged that his supervisor told him he needed to "get married and get some of that soft pink smelly stuff that's between the legs of a woman." The plaintiff further alleged that his co-workers told him that he should get married and should go out with a certain female employee "because she 'fucks.'" *Id.* at 1453. Plaintiff's co-workers allegedly "periodically asked him if he had gotten any 'pussy' or had oral sex, showed him pictures of nude women, told him they would get him 'fucked,' accused him of being gay or bisexual, and made other sex-related comments." *Id.* at 1454.

66. *Id.* at 1454.

67. *Id.* at 1456 (citations omitted).

68. *Id.*

69. *Id.*

70. See *Garcia v. Elf Atochem N. Am.*, 28 F.3d 446, 451-52 (5th Cir. 1994) (citing *Goluszek* and holding that same-sex sexual harassment is not gender discrimination and, thus, is not actionable under Title VII); *Oncale v. Sundowner Offshore Servs.*, 67 Fair Empl. Prac. Cas. (BNA) 769, 770 (E.D. La. 1995), *aff'd*, 83 F.3d 118 (5th Cir. 1996); *Wrightson v. Pizza Hut of Am., Inc.*, 909 F. Supp. 367, 368 (W.D.N.C. 1995); *Ashworth v. Roundup Co.*, 897 F. Supp. 489, 492-94 (W.D. Wash. 1995); *Benekritis v. Johnson*, 882 F. Supp. 521, 526 (D.S.C. 1995); *Hopkins v. Baltimore Gas & Elec. Co.*, 871 F. Supp. 822, 833-34 (D. Md. 1994), *aff'd on other grounds*, 77 F.3d 745 (4th Cir. 1996); *Fleenor v. Hewitt Soap Co.*, 67 Fair Empl. Prac. Cas. (BNA) 1625, 1627-28 & n. 10 (finding the reasoning of *Goluszek* persua-

Although neither *Goluszek* nor its progeny expressly discusses MacKinnon's inequality theory of sexual harassment, the rationale of *Goluszek* demonstrates that MacKinnon's inequality theory of discrimination does not transfer to sexual harassment in the same-sex context. Central to the rationale of *Goluszek* is the notion that regardless of how harmful same-sex sexual harassment may be for the victim of that harassment, it does not send a message of gender inferiority; therefore, it is not discrimination on the basis of sex.⁷¹ MacKinnon herself explained that the inequality theory is concerned only with practices that promote or perpetuate social inferiority:

[t]he inequality conception . . . is grounded in an analysis of the balance of power between specific groups with particular social histories. Sex discrimination is treated as a logical and necessary outgrowth of a social whole in which the human sex difference has been transformed into a systematic social inequality—for the benefit of some, to the detriment of others.⁷²

Same-sex sexual harassment does not alter this "balance of power" between the sexes. Although the individual harasser may benefit from his harassing behavior and the individual victim of his harassment may suffer a detriment because of it, the equality or inequality of the sexes remains static.⁷³

This point is well illustrated by the distinction between homosexual and heterosexual pornography:

sive with respect to the plaintiff's claim of same-sex hostile environment harassment and expressing no opinion on the question of whether same-sex quid pro quo harassment is actionable under Title VII), *aff'd on other grounds*, 81 F.3d 48, 49 (6th Cir. 1996), *cert. denied*, 1996 U.S. LEXIS 5418 (U.S. Oct. 7, 1996); *Polly v. Houston Lighting & Power Co.*, 803 F. Supp. 1, 6 (S.D. Tex. 1992).

Cf. Schoiber v. Emro Marketing Co., No. 95-C-5726, 1996 U.S. Dist. LEXIS 14723, at *23 (N.D. Ill. Oct. 3, 1996) (concluding simply that Congress did not intend for Title VII to proscribe same-sex sexual harassment); *Torres v. National Precision Blanking, Inc.*, No. 96-C-776, 1996 U.S. Dist. LEXIS (N.D. Ill. Oct. 7, 1996) (same); *McWilliams v. Fairfax County Bd. of Supervisors*, 72 F.3d 1191, 1195-96 (4th Cir. 1996) ("As a purely semantic matter, we do not believe that in common understanding the kind of shameful heterosexual-male-on-heterosexual-male conduct alleged here (nor comparable female-on-female conduct) is considered to be 'because of the [target's] 'sex.'") (alteration and emphasis in the original), *cert. denied*, 1996 U.S. LEXIS 4780 (U.S. Oct. 7, 1996); *Mayo v. Kiwest Corp.*, 898 F. Supp. 335, 336-37 (E.D. Va. 1995) (reasoning that same-sex sexual harassment is not discrimination "because of the Plaintiff's gender"), *aff'd without op.*, 94 F.3d 641 (4th Cir. 1996).

71. See *Grose*, *supra* note 41, at 382-83 (noting that the *Goluszek* court refused to recognize the claim of a male that his male co-workers had created a sexually hostile environment because "the concerns that Title VII seeks to address in prohibiting sexual harassment simply are not present in a same-sex situation"). *Cf. Kathryn Abrams, Title VII and the Complex Female Subject*, 92 MICH. L. REV. 2479, 2523 (1994) (*Goluszek* seems to be premised on the notion that "when a judgment against a person in group X is made by another person in group X, it is assumed to be the result of personal antagonism, rather than group-based beliefs.").

72. *MACKINNON*, *supra* note 2, at 126-27.

73. See *Easton v. Crossland Mortgage Corp.*, 905 F. Supp. 1368, 1383 (C.D. Cal. 1995) ("The imbalance of power resulting from a dominant gender disadvantaging a subservient gender does not figure into [same-sex communications]."). See also *Grose*, *supra* note 41, at 385 ("Sexual harassment is about male subordination of females—a power dynamic unique to that interaction. Suggesting that it simply is about treating people on the job differently 'because of their sex' obscures the essence of the offensive behavior: the socially constructed power differential that exists between men and women.").

In homosexual pornography both participants in a sexual depiction are male. Thus, to the extent any coercion, objectification or violence is depicted, both the perpetrator and the victim are male. There is no distinct and recognizable "other" against whom these degradations are being committed. Conversely in male centered heterosexual pornography, women are traditionally and routinely degraded. There is a distinct and recognizable dominant class (men) and subjugated class (women).⁷⁴

The inequality theory makes allowance for the reality that context is critical to the meaning given to the message that a would-be harasser sends. Assume for example that a supervisor refers to both a white employee and a black employee as "nigger." Under the but-for or differences theory of discrimination, the supervisor has not discriminated based on race because he has treated the white employee and the black employee identically. Under the inequality theory of discrimination, however, the finder of fact must consider the disparate effects that the supervisor's actions are likely to have on the two employees. The white employee who is called "nigger" is likely to be more confused than offended.⁷⁵ For the black employee, the message of racial hostility is unmistakable.

Judge Richard Posner has noted the importance of context in sexual harassment litigation:

We are mindful of the dangers that lurk in trying to assess the impact of words without taking account of gesture, inflection, the physical propinquity of the speaker and hearer, the presence or absence of other persons, and other aspects of context. . . . Even a gross disparity in size between speaker and listener, favoring the former, might ominously magnify the impact of the speaker's words.⁷⁶

Even more so, race, gender, sexual orientation, cultural and historical experiences and numerous other contextual variables are highly relevant to the inequality theory inquiry. For example, a noose hung over a black man's desk by his white co-worker expresses a racist enmity more powerfully than a noose hung over a white man's desk by his black co-worker because of

74. *Fox v. Sierra Dev. Co.*, 876 F. Supp. 1169, 1176 n.9 (D. Nev. 1995) (citing Carlin Meyer, *Sex, Sin, and Women's Liberation: Against Porn-Suppression*, 72 TEX. L. REV. 1097, 1137 & nn.174-75 (1994)). In *Fox*, the male plaintiffs alleged that they had been subjected to a sexually hostile work environment when their supervisors and other co-employees openly had discussed, drawn, and written about homosexual sex acts. The court acknowledged that the complaint possibly alleged a hostile and abusive work environment, 876 F. Supp. at 1174, but held that the complaint failed to state a cause of action under Title VII because it had not "allege[d] facts indicating the work environment was hostile to the [plaintiffs] on the basis of their gender." See *id.* at 1172-73. Finally, the *Fox* court opined that same-sex harassment might be actionable under a "but-for" theory of discrimination: "If [the alleged] conduct were directed only at men, or were directed at plaintiffs because they were men, it might be actionable as gender oriented harassment." *Id.* at 1173.

75. Cf. *Fair v. Guiding Eyes for Blind, Inc.*, 742 F. Supp. 151, 156 (S.D.N.Y. 1990) ("It is difficult to understand how [a man]'s allegedly calling a man on the golf course a 'bitch' can be considered sexual harassment towards either a woman or a man.").

76. *Baskerville v. Culligan Int'l Co.*, 50 F.3d 428, 431 (7th Cir. 1995).

the history in the United States of lynching black men.⁷⁷ Taking that hypothetical a step further, one sees that if both the person who hangs the noose and the person for whom the noose is hung are of the same race, the noose loses much of its message of racial animosity.

Similarly, even if one accepts MacKinnon's notion that a male supervisor's sexual harassment of his female subordinate "makes of women's sexuality a badge of female servitude,"⁷⁸ a lesbian supervisor's similar harassment of her female subordinate cannot reasonably be seen as sending the message to the victim that she is inferior because of her sex.⁷⁹

C. A Compelling Theory "But-For" Its Inconsistencies

As demonstrated, the inequality theory of sexual harassment cannot support a cause of action for same-sex sexual harassment under Title VII. The argument remains, however, that courts should recognize the cause of action under the "but-for" or differences theory of sexual harassment. The argument is superficially compelling. Assuming that a supervisor sexually harasses only his male employees, men are treated unequally since they must meet sexual demands (or suffer a detriment for refusing to meet such sexual demands) that similarly situated women do not. This disparate treatment is no less arbitrary in the same-sex context than it is in the mixed-sex context.⁸⁰

77. See *Vance v. Southern Bell Tel. & Tel. Co.*, 863 F.2d 1503, 1511 n.4 (11th Cir. 1989) (commenting in a case presenting a Section 1981 claim based on a racially hostile environment that "[t]he grossness of hanging an object resembling a noose at the work station of a black female is self-evident").

78. MacKinnon, *supra* note 2, at 189.

79. I sent Professor MacKinnon a draft of this Article shortly before it went to publication. She was kind enough to respond and share with me her critique of my argument. In sum, Professor MacKinnon vehemently disagrees with most of my arguments and she strongly opposes my use of her writings to argue for a result that she abhors. In particular, Professor MacKinnon believes that same-sex sexual harassment is discrimination on the basis of sex. In her view, anyone who is singled out for harassment or abuse, wherever we have sex equality rules, for their place in the gender system should be able to bring a sex equality claim. Under the "differences" theory, lesbians or gay men harassed as such, or anyone harassed for gendered reasons, would have a claim when they would not be so treated "but for sex," meaning but for their own gender. Under her alternate "inequality" theory, the subordination of gay men and lesbians is actionable as a product of male dominance. Gay men and lesbians are harassed for challenging the gender rules of male supremacy, which is not a sex-equal system. Apart from providing a remedy for the many people now violated without relief, whom she feels my approach sacrifices, Professor MacKinnon also believes that judicial recognition of employment rights in the same-sex context would materially advance gay rights as a whole. In her analysis, gay men and all women share an interest in ending male supremacy, and this clearly supported doctrinal step would promote that joint interest. Letter from Catharine A. MacKinnon, Professor of Law, *University of Michigan*, to Gary Spitko (Oct. 26, 1996) (on file with the *Berkeley Journal of Employment and Labor Law*).

80. Indeed, several commentators recently have called for judicial recognition of a cause of action under Title VII for same-sex sexual harassment. See Levitsky, *supra* note 62, at 1014 (arguing that a refusal to recognize same-sex sexual harassment "seems inappropriate given that victims of . . . [such] harassment suffer no less an injury from sexual harassment than victims of opposite-sex sexual harassment"); Trish K. Murphy, Comment, *Without Distinction: Recognizing Coverage of Same-Gender Sexual Harassment Under Title VII*, 70 WASH. L. REV. 1125, 1125 (1995) ("[N]o valid justification exists for distinguishing between same-gender sexual harassment and sexual harassment involving members of

Nevertheless, the but-for theory of discrimination should not be applied in the context of same-sex sexual harassment because courts have refused to apply the theory in the context of claims of sexual orientation discrimination in employment. Courts have failed to provide a remedy under Title VII for sexual orientation discrimination victims even though these victims would not have suffered discrimination "but for" the fact that their preferred erotic or romantic partners were of the same sex.⁸¹ The practical result of this failure is that no federal law proscribes discrimination in employment on the basis of sexual orientation.⁸² While the status quo in federal employment discrimination law thus allows employers the freedom to discriminate on the basis of sexual orientation, recognition of a cause of action for same-sex sexual harassment under Title VII would make such discrimination in employment economically rational.

This conclusion follows from the premise that a finder of fact would be likely to penalize much allegedly sexually harassing behavior in the same-sex context that it would not penalize if the putative victim and the alleged harasser were of different sexes. Part III of this Article sets forth the argument that this increased likelihood of liability results from the heterosexist nature of the "reasonable person" standard that the fact finder uses to judge whether allegedly sexually harassing behavior is sufficiently abusive to be actionable.⁸³

In sum, the incongruence that arises from application of the but-for theory to same-sex sexual harassment, in conjunction with the heterosexist nature of the sexual harassment standard, provides a powerful financial incentive to employers to discriminate against gay men and lesbians. Although federal law would not protect gay men and lesbians from such employment discrimination based on their sexual orientation, their potential

different genders."); Lisa Wehren, Note, *Same-Gender Sexual Harassment Under Title VII: Garcia v. Elf Atochem Marks a Step in the Wrong Direction*, 32 CAL. W.L. REV. 87, 91 (1995) ("If the harassing conduct amounts to actionable sexual harassment in the cross-gender context, the same exact conduct cannot be said to be outside the purview of Title VII merely because it is directed at a person of the same gender.").

81. With respect to this asymmetry, Kathryn Abrams has observed: "To the extent that discrimination against gay men is actually a form of policing of their departures from traditional gender roles . . . such harassment may actually embody more of the gender discrimination at which [Title VII] was aimed than the advances of gay supervisors would." Kathryn Abrams, *supra* note 71, at n.127.

82. Nine states, the District of Columbia and several dozen municipalities ban discrimination in private employment on the basis of sexual orientation. See Cal. Labor Code § 1102.1; Conn. Gen. Stat. § 46a-81a through 46a-81r; D.C. Code Ann. §§ 1-2501 *et seq.*; Haw. Rev. Stat. §§ 378-1 through 378-6; Mass. Gen. Laws Ann. ch. 151B, §§ 1-10; 1993 Minn. Stat. §§ 363.01 *et seq.*; 1992 N.J. Laws 10:5-1 through 10:5-42; R.I. Gen. Laws § 28-5-5 *et seq.*; Vt. Stat. Ann. tit. 21 §§ 494 through 496; Wis. Stat. Ann. § 111.36(d)(1); Equal Employment Advisory Council, "Updated Survey of State and Local Jurisdictions with Laws Prohibiting Discrimination on the Basis of Sexual Orientation," Dec. 2, 1994, pp. 16-19 (listing localities that have sexual orientation anti-discrimination laws applicable to private employers).

83. See generally *Harris v. Forklift Sys., Inc.*, 510 U.S. 17 (1993). See also *infra* notes 117-124 and accompanying text.

employers would face an increased likelihood of liability for alleged same-sex sexual harassment, relative to the likelihood of liability for an allegation of comparable mixed-sex sexual harassment. Thus, the employer would be prudent, all other factors being equal, to refuse to employ gay people—an option that remains legal under federal law.⁸⁴

A broader understanding of how the differences approach has been selectively applied under Title VII to disadvantage gay people will facilitate an understanding of this argument. Courts have failed or refused to apply the but-for theory of sex discrimination across the board in Title VII litigation; thus, they have retained the discretion to apply this theory of discrimination in a discriminatory fashion. For example, courts of appeals have uniformly held that an employer does not violate Title VII's proscription of sex discrimination when it applies different grooming standards to men than it does to women.⁸⁵ *Willingham v. Macon Telegraph Publishing Co.*⁸⁶ is a typical case. In *Willingham*, the court held that an employer's grooming code, which excluded employment of men with long hair but allowed employment of women with long hair, was not sex discrimination within the purview of Title VII.

84. One could extrapolate from the argument I set forth in Part III on the heterosexist nature of the reasonable person standard and argue that the reasonable person standard also disadvantages women and racial and religious minorities. The impunity with which an employer may discriminate against gay people *qua* gay people, however, distinguishes the plight of those with a minority sexual orientation from those other minorities. Title VII expressly forbids discrimination on the basis of "race, color, religion, sex, or national origin." 42 U.S.C. §2000e-2(a)(1). Therefore, even assuming a generalized majoritarian bias inherent in the reasonable person standard, such bias would not support an argument against recognition of claims for "reverse" discrimination relating to an environment hostile on the basis of gender, race, or religion. *But see* *King v. M.R. Brown, Inc.*, 911 F. Supp. 161, 167 (E.D. Pa. 1995) ("[T]he cognizability of reverse discrimination claims under Title VII belies th[e] conclusion" that same-sex sexual harassment is not actionable under Title VII.); *EEOC v. Walden Book Co.*, 885 F. Supp. 1100, 1103 (M.D. Tenn. 1995) ("It would be untenable to allow reverse discrimination cases but not same-sex sexual harassment cases to proceed under Title VII."); *Sardinia v. Dellwood Foods, Inc.*, No. 94-5458, 1995 U.S. Dist. LEXIS 16073, at *16 (S.D.N.Y. Oct. 30, 1995) (same); *Prescott v. Independent Life & Accident Ins. Co.*, 878 F. Supp. 1545, 1550 (M.D. Ala. 1995) (pointing to the Supreme Court's recognition of "reverse [race] discrimination" claims by white plaintiffs as support for the recognition of a cause of action for same-sex sexual harassment).

85. *See* *Barker v. Taft Broad. Co.*, 549 F.2d 400, 401-02 (6th Cir. 1977); *Earwood v. Continental Southeastern Lines, Inc.*, 539 F.2d 1349, 1351 (4th Cir. 1976); *Longo v. Carlisle DeCoppet & Co.*, 537 F.2d 685, 685 (2d Cir. 1976) (per curiam); *Knott v. Missouri Pac. Ry. Co.*, 527 F.2d 1249, 1252 (8th Cir. 1975); *Willingham v. Macon Tel. Publ'g Co.*, 507 F.2d 1084, 1092 (5th Cir. 1975) (en banc); *Baker v. California Land Title Co.*, 507 F.2d 895, 896-97 (9th Cir. 1974), *cert. denied*, 422 U.S. 1046 (1975); *Dodge v. Giant Foods, Inc.*, 488 F.2d 1333, 1335 (D.C. Cir. 1973) (per curiam); *Fagan v. National Cash Register Co.*, 481 F.2d 1115, 1125-26 (D.C. Cir. 1973). *See also* *Bellisimo v. Westinghouse Elec. Corp.*, 764 F.2d 175, 181 (3d Cir. 1985), ("[D]ress codes . . . are permissible under Title VII as long as they . . . are enforced even-handedly between men and women, even though specific requirements may differ."), *cert. denied*, 475 U.S. 1035 (1986). *Compare* *Carroll v. Talman Fed. Sav. & Loan Ass'n of Chicago*, 604 F.2d 1028, 1032 (7th Cir. 1979) (ruling that although gender disparate personal appearance standards do not necessarily violate Title VII, an employer may not require that its female employees wear a uniform while its male employees are required only to dress in business attire).

86. 507 F.2d 1084 (5th Cir. 1975) (en banc).

The plaintiff's argument was straightforward: the employer had discriminated against him on the basis of his sex when it had denied him employment because of his long hair, for the employer would not have denied employment to a woman with similarly long hair.⁸⁷ The Court of Appeals for the Fifth Circuit rejected this "but-for" argument:

Equal employment *opportunity* may be secured only when employers are barred from discriminating against employees on the basis of immutable characteristics, such as race and national origin. Similarly, an employer cannot have one hiring policy for men and another for women *if* the distinction is based on some fundamental right. But a hiring policy that distinguishes on some other ground, such as grooming codes or length of hair, is related more closely to the employer's choice of how to run his business than to equality of employment opportunity.⁸⁸

The refusal of courts to apply the but-for principle in adjudicating Title VII challenges to gender-disparate grooming codes can be explained by reference to (1) the courts' judgment that the impact of such codes on employees is *de minimis*, and (2) the inference drawn by courts that Congress, therefore, must not have intended to proscribe such gender disparate codes.⁸⁹

A similar judicial negative inference drawn from congressional silence underlies the failure of courts to apply the but-for theory of sex discrimination when adjudicating claims of sexual orientation discrimination under Title VII. Courts that have addressed the issue have universally held that sexual orientation discrimination is not actionable under Title VII.⁹⁰ Be-

87. *Id.* at 1088.

88. *Id.* at 1091 (original emphasis). *But see* EEOC v. Sage Realty Corp., 87 F.R.D. 365, 369 (S.D.N.Y. 1980) (finding that plaintiff alleging that employer made female employees but not male employees wear sexually provocative and revealing uniform had stated a cause of action under Title VII).

89. *Id.* at 1090. *See also* Barker, 549 F.2d at 401 ("Employer grooming codes requiring different hair length for men and women bear such a negligible relation to the purposes of Title VII that we cannot conclude that they were a target of the Act."); Knott, 527 F.2d at 1252 ("[S]light differences in the appearance requirements for males and females have only a negligible effect on employment opportunities."). *But see* Barker, 549 F.2d at 404 (McCree, J., dissenting) ("[T]here appears to be no justification for limiting an employee's statutory rights against a private employer to the circumstances in which a person enjoys constitutional protection against government action.") (original emphasis); Earwood, 539 F.2d at 1352 (Winter, J., dissenting) ("Grooming standards are clearly 'terms, conditions, or privileges of employment.'").

90. *See* Dillon v. Frank, 952 F.2d 403, No. 90-2290, 1992 U.S. App. LEXIS 766, at *22 (6th Cir. Jan 15, 1992) (unpublished opinion) (holding that Title VII does not make illegal comments and assaults directed at plaintiff because of his alleged homosexuality); Williamson v. A.G. Edwards & Sons, Inc., 876 F.2d 69, 70 (8th Cir. 1989) (holding, without discussion, that "Title VII does not prohibit discrimination against homosexuals"), *cert. denied*, 493 U.S. 1089 (1990); Pritchett v. Sizeler Real Estate Management Co., 67 Fair Empl. Prac. Cas. (BNA) 1377, 1378 (E.D. La. 1995) ("It is abundantly clear that Title VII does not protect against discrimination on any basis relating to sexual orientation."); Quick v. Donaldson Co., 895 F. Supp. 1288, 1297 (S.D. Iowa 1995) ("Title VII applies only to 'discrimination on the basis of gender and should not be judicially extended to include sexual preferences such as homosexuality.'") (citation omitted); The EEOC also has taken the position that sexual orientation discrimination is not actionable under Title VII. EEOC Decision 76-75, 19 Fair Empl. Prac. Cas. (BNA) 1823, 1824 (1975) (explaining that there is no evidence that Congress, when enacting Title VII, intended to

sides demonstrating the courts' inconsistent application of the but-for theory, an examination of this case law also will help to illuminate the discussion in Part III on the "reasonable heterosexual" standard. This case law exemplifies a heterosexual judiciary subjectively and discriminatorily applying the law in a manner that disadvantages gay people.

The most important case involving a challenge to sexual orientation discrimination under Title VII is *DeSantis v. Pacific Telephone & Telegraph Co.*⁹¹ In *DeSantis*, the court reasoned by negative inference that Title VII did not proscribe discrimination on the basis of sexual orientation: "Congress has not shown any intent other than to restrict the term 'sex' to its natural meaning. Therefore this court will not expand Title VII's application in the absence of Congressional mandate."⁹²

The *DeSantis* court expressly rejected the but-for argument that "if a male employee prefers males as sexual partners, he will be treated differently from a female who prefers male partners."⁹³ The court found that the but-for theory was inapposite because "whether dealing with men or women the employer is using the same criterion: it will not hire or promote a person who prefers sexual partners of the same sex. Thus, this policy does not involve different decisional criteria for the sexes."⁹⁴

The *DeSantis* court also carved out a "homosexual exception" to the disparate impact standard announced in *Griggs v. Duke Power Co.*⁹⁵ The appellants in *DeSantis* argued that an employer's ban on gay employees disproportionately impacted men because more men than women are gay

include "sexual practices" within the meaning of the term "sex"); EEOC Compliance Manual (BNA) §§ 615.2(b)(3) (1988).

91. 608 F.2d 327 (9th Cir. 1979).

92. *Id.* at 329 (quoting *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659, 663 (9th Cir. 1977)). See also *Sommers v. Budget Mktg., Inc.*, 667 F.2d 748, 750 (8th Cir. 1982) (rejecting a transsexual's claim that her employer violated Title VII by discriminating against her because she was a woman with male anatomy: "the word 'sex' in Title VII is to be given its traditional definition Because Congress has not shown an intention to protect transsexuals, we hold that discrimination based on one's transsexualism does not fall within the protective purview of the Act."). But see *James v. Ranch Mart Hardware, Inc.*, 66 Fair Empl. Prac. Cas. (BNA) 1338, 1339 (D. Kan. 1994) (ruling that a plaintiff, who alleged that his employer terminated his employment because he was a man living as a woman and that his employer would not have terminated a woman living as a man, had stated a claim for sex discrimination under Title VII).

93. 608 F.2d at 331.

94. *Id.* See also *Smith v. Liberty Mut. Ins. Co.*, 569 F.2d 325, 326-27 (5th Cir. 1978) (holding that Title VII does not proscribe discrimination on the basis of effeminacy, reasoning that "[h]ere the claim is not that Smith was discriminated against because he was a male, but because as a male, he was thought to have those attributes more generally characteristic of females . . ."); *Davis v. Sheraton Soc'y Hill Hotel*, 907 F. Supp. 896, 902 (E.D. Pa. 1995) (finding that harassment of a male employee because he wore an earring and carried a red satchel was discrimination based on "sexual identity" but not because of "sex"); *Carreno v. Local Union No. 226, Int'l Bhd. of Elec. Workers*, 54 Fair Empl. Prac. Cas. (BNA) 81, 82-83 (D. Kan. 1990) ("The test enunciated for sexual harassment should be 'but for' the fact of [his] sex, [he] would not have been the object of harassment. . . . In this case, the harassment suffered by the plaintiff was not encountered because of his sex; rather this harassment was encountered because of his sexual preference.") (citations omitted).

95. 401 U.S. 424 (1971).

and because an employer can more easily identify a gay man than it can a lesbian. Thus, the appellants argued, under *Griggs* such an employment practice violated Title VII.⁹⁶ The *DeSantis* court accepted for the sake of argument that the appellants could satisfy the *Griggs* standard, but held that *Griggs* could not be applied to extend Title VII to gay people.⁹⁷

In finding that the disproportionate impact of educational tests on blacks violated Title VII, the Supreme Court in *Griggs* sought to effectuate a major congressional purpose in enacting Title VII: protection of blacks from employment discrimination. . . . Congress did not intend[, however,] to protect sexual orientation and has repeatedly refused to extend such protection. . . . [Allowing appellants' disparate impact claim] would achieve by judicial "construction" what Congress did not do and has consistently refused to do on many occasions. It would violate the rule that our duty in construing a statute is to "ascertain . . . and give effect to the legislative will."⁹⁸

The same Court of Appeals for the Ninth Circuit, in *Davis v. County of Los Angeles*,⁹⁹ had found that a five-foot seven-inch height requirement for county firefighters had a disparate impact on Mexican-American applicants.¹⁰⁰ The court held the height restriction, therefore, violated Title VII because the employer had not shown that the height requirement was job-related.¹⁰¹ There is, of course, no indication in the language or history of Title VII that Congress intended to protect employees from discrimination on the basis of height.¹⁰²

Moreover, the *DeSantis* reasoning is diametrically at odds with the reasoning supporting the majority view that an allegation of antimiscegenation discrimination by an employer states a claim under Title VII.¹⁰³ The but-

96. 608 F.2d at 330.

97. *Id.* at 330-31.

98. *Id.* (quoting *Philbrook v. Glodgett*, 421 U.S. 707, 713 (1975)).

99. 566 F.2d 1334 (9th Cir. 1977).

100. *Id.* at 1341.

101. *Id.* at 1341-43. *See also* *Dothard v. Rawlinson*, 433 U.S. 321, 328-332 (1977) (holding that height requirements that have a discriminatory effect on women violate Title VII unless the employer demonstrates "a manifest relationship to the employment in question") (quoting *Griggs*, 401 U.S. at 432). *Compare with DeSantis*, 608 F.2d at 333 (Sneed, J., dissenting) (arguing that use of "homosexuality as a disqualification for employment" disproportionately impacts males states a Title VII claim under *Griggs*).

102. Indeed, in *Griggs* the Supreme Court did not hold that Congress, in enacting Title VII, intended to protect those without a high school education. The Court's holding was straightforward: "If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited." 401 U.S. at 431.

103. *See Parr v. Woodmen of the World Life Ins. Co.*, 791 F.2d 888, 891-92 (11th Cir. 1986); *Erwin v. Mister Omelet of Am.*, 54 Fair Empl. Prac. Cas. (BNA) 1456, 1459 (M.D.N.C. 1991) (involving a "romantic involvement," rather than a marriage); *Reiter v. Center Consol. Sch. Dist.*, 618 F. Supp. 1458, 1460 (D. Colo. 1985) ("[D]iscriminatory employment practices based on an individual's association with people of a particular race or national origin are prohibited under Title VII."); *Whitney v. Greater N.Y. Corp. of Seventh Day Adventists*, 401 F. Supp. 1363, 1366 (S.D.N.Y. 1975) (involving a "casual social relationship" rather than a marriage).

The EEOC also takes the position that an employer violates Title VII by discriminating against an employee because of his association with people of a different race. *See* EEOC decision 71-1902, 3 Fair

for theory of discrimination is applied in these miscegenation/interracial association cases even though "whether dealing with [blacks] or [whites] the employer is using the same criterion: it will not hire or promote a person who prefers sexual partners of the [other race]." ¹⁰⁴ "The underlying rationale in these cases is that the plaintiff was discriminated against on the basis of his race because his race was different from the race of the people he associated with." ¹⁰⁵

By parallel reasoning, a plaintiff should possess a cause of action for discrimination when he alleges that he has been discriminated against on the basis of a homosexual relationship, desire, or sex act that would not have been sanctioned had the focus of his relationship, desire, or act been a person of the sex different from his own. ¹⁰⁶ Thus, sexual orientation discrimination fits easily within the but-for theory of sex discrimination: but for his sex, a gay man would not be discriminated against for having an erotic or romantic attraction toward a man. ¹⁰⁷ The inconsistency of the courts' reasoning from sexual orientation to miscegenation/association is illustrated by the hypothetical employer that has discriminated in employment against a white man who has a black lover. If the employer discriminated against the employee because his lover is of a different race, the employee may maintain a cause of action under Title VII. However, if the employer discriminated against the employee because his lover is of the same sex, Title VII does not apply.

Empl. Prac. Cas. (BNA) 1244, 1244 (1971) ("[E]mployer violated Title VII by discharging Caucasian female employee because of her race, it appearing that employee's dating a Negro was at least a factor in her discharge."); EEOC decision 71-909, 3 Fair Empl. Prac. Cas. (BNA) 269, 269 (1970) ("[E]mployer violated Title VII by discharging Caucasian employee because of his friendly association with Negro employees").

104. *DeSantis*, 608 F.2d at 331.

105. *Reiter*, 618 F. Supp. at 1460. *See also Parr*, 791 F.2d at 891-92 ("Where a plaintiff claims discrimination based upon an interracial marriage or association, he alleges, by definition, that he has been discriminated against because of his race."); *Gresham*, 586 F. Supp. at 1445 (expressly applying a "but-for" analysis); *Whitney*, 401 F. Supp. at 1366 ("Specifying as she does that she was discharged because she, a white woman, associated with a black, her complaint falls within the statutory language that she was 'discharge[d] . . . because of [her] race.'").

106. *See Baehr v. Lewin*, 852 P.2d 44, 48-49 (Haw. 1993) (holding that statute allowing mixed-sex marriages but not same-sex marriages discriminates on the basis of sex and, thus, violates equal protection clause of Hawaii constitution, unless the state can demonstrate that the statute is narrowly drawn to further a compelling interest). *See also Loving v. Virginia*, 388 U.S. 1, 7-8 (1967) (holding that statute criminalizing miscegenation discriminates on the basis of race and violates Equal Protection Clause of the Fourteenth Amendment); *Marcosson*, *supra* note 40, at 4-6 & n.24 (arguing that "[b]ecause discrimination based on interracial marriage states a Title VII claim it cannot be argued that the method of constitutional interpretation used in *Loving* distinguishes it from the statutory construction appropriate for Title VII").

107. *See Marcosson*, *supra* note 40, at 9-10 ("If we agree that sexual orientation discrimination treats men and women differently in the same way that antimiscegenation laws treat blacks and whites differently, then such policies employ gender classifications, and they are barred by Title VII even if in 1964 Congress did not foresee that anti-gay discrimination was included.").

The language of Title VII proscribes on its face all sex discrimination; therefore, courts may not legitimately exempt from Title VII's coverage sex discrimination relating to romantic or physical attractions unless "there is 'clearly expressed legislative intention' contrary to that language, which would require [the court] to question the strong presumption that Congress expresses its intent through the language it chooses."¹⁰⁸ There is no such limiting language relating to sexual orientation in the relevant legislative history of Title VII.

The prohibition against employment discrimination based on "sex" was offered as a floor amendment to Title VII in the House of Representatives one day before the House approved Title VII.¹⁰⁹ The House debate on the amendment fills a mere eight pages of the Congressional Record.¹¹⁰ The Senate did not debate the provision at all.¹¹¹ Thus, the courts "are left with little legislative history to guide [them] in interpreting the Act's prohibition against discrimination based on 'sex'."¹¹²

Courts have gazed into this void, however, and they have seen a reflection of their own heterosexism and homophobia: because a presumptively heterosexual and homophobic Congress did not expressly address employment discrimination against gay people *qua* gay people, it must not have intended to protect gay people from such discrimination. In this way, the courts have illustrated the danger to gay people in judicial exercise of a power of questionable legitimacy "to narrow statutory texts, insofar as to make them more precisely tailored to the purpose that the Court per-

108. See *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 432 n.12 (1987) (quoting *United States v. James*, 478 U.S. 597, 606 (1986)).

109. See 110 Cong. Rec. 2577-84 (1964) (remarks of Representatives Smith, Tuten, Andrews, and Rivers). The amendment was offered in the hope that its adoption ultimately would defeat passage of Title VII in its entirety. See, e.g., *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 63-64 (1986); Francis J. Vaas, *Title VII: Legislative History*, 7 BOSTON C. INDUS. & COM. L. REV. 431, 441-42 (1966). Indeed, Representative Howard Smith, who successfully proposed the amendment to Title VII that added the prohibition of "sex" discrimination, voted against Title VII in its entirety the next day. See 110 Cong. Rec. 2804 (1964).

110. See 110 Cong. Rec. 2577-84 (1964).

111. Claypoole, *supra* note 4, at 1165 (concluding that "[t]he small amount of legislative history that does exist shows that Congress did not intend to create a remedy for most of the situations that now fall under the definition of sexual harassment").

112. *Meritor*, 477 U.S. at 63-64; *Ellison v. Brady*, 924 F.2d 872, 875 (9th Cir. 1991). There is in fact no support in the legislative history for inclusion of sexual harassment as a form of sex discrimination. See Epstein, *supra* note 4, at 357.

ceives.”¹¹³ Such an exercise enables courts to project their own heterosexism and homophobia onto Congress and the laws that Congress enacts.¹¹⁴

Having so projected a heterosexist and homophobic intent onto Congress, courts should at least consistently refuse to apply the differences approach to employment discrimination across the spectrum of same-sex contexts. Courts should find that the same (heterosexist) Congress that must not have intended (as demonstrated by its silence) to protect gay people from discrimination in employment also must not have been concerned with same-sex sexual harassment. The failure of courts to rule consistently in this area will result in the imposition of relatively greater liability for the employer of a gay sexual harasser. This increased exposure to liability, coupled with *de jure* immunity for the employer who refuses to employ a gay person, provides a powerful incentive to the employer, all other factors being equal, to prefer to employ the non-gay candidate over the gay candidate.¹¹⁵

The conclusion that recognition of a cause of action for same-sex sexual harassment will disadvantage gay people in this way is necessarily based on the premise that an employer's actual liability for an act of same-sex sexual harassment would exceed the employer's actual liability for a comparable act of mixed-sex sexual harassment. The following Part sets forth an argument that supports this premise.

113. See *Rose v. Rose*, 481 U.S. 619, 640 (1987) (Scalia, J., concurring). See also *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 452-54 (1987) (Scalia, J., concurring in the judgment) (“Judges interpret laws rather than reconstruct legislators’ intentions. Where the language of those laws is clear, we are not free to replace it with an unenacted legislative intent.”); *Union Bank v. Wolas*, 502 U.S. 151, 158 (1991) (“The fact that Congress may not have foreseen all of the consequences of a statutory enactment is not a sufficient reason for refusing to give effect to its plain meaning.”); *Marcosson*, *supra* note 40, at 9 (citing Justice Scalia’s theory of statutory interpretation in support of the proposition that congressional intent in enacting Title VII is “somewhat irrelevant” in deciding whether sexual orientation discrimination is actionable under Title VII).

114. There is Supreme Court precedent for the proposition that Congress did not mean what it said in enacting Title VII and for the proposition that courts are free to disregard the explicit language of the statute in order to give effect to the “true intention” of Congress. In *United Steelworkers v. Weber*, 443 U.S. 193 (1979), which presented a challenge by white workers to an employer and union plan that reserved 50 percent of the openings in a craft-training program for black employees, the Court rejected a “literal construction” of Title VII citing to the “familiar rule that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit nor within the intention of its makers.” *Id.* at 201 (quoting *United States v. Church of the Holy Trinity*, 143 U.S. 457, 459 (1892)). In upholding the challenged set-aside program, the Court examined the legislative history of Title VII and found that an interpretation of Title VII that forbade “affirmative action” would be contrary to the purpose of the statute. *Id.* at 201-02.

In his dissent, Justice Rehnquist pointed out that the plain language of Title VII “flatly prohibited” racial discrimination in favor of blacks, *id.* at 228, and presented ample evidence from the legislative history that congressional supporters of the legislation intended to outlaw all race discrimination by covered employers. *Id.* at 230-239.

115. Cf. Hannah Katherine Vorwerk, Note, *The Forgotten Interest Group: Reforming Title VII to Address the Concerns of Workers While Eliminating Sexual Harassment*, 48 VAND. L. REV. 1019, 1022 (1995) (arguing that Title VII standards for holding employers liable for sexual harassment provide a “great incentive [to employers] to fire [an employee accused of sexual harassment] immediately”).

III

THE REASONABLE HETEROSEXIST STANDARD

A. *The Reasonable Person as a Community Norm*

In 1992, Gonzalo Herrera filed suit under California law against *The Advocate*, a gay-oriented magazine, alleging that his male supervisor had subjected him to unwanted sexual advances, lewd physical contact and sexually explicit language. At first, *The Advocate's* publishers defended against the lawsuit by arguing that same-sex sexual harassment was not actionable under California law. The publishers later ordered their attorneys to withdraw that defense after gay activists criticized the magazine for adopting a litigation strategy adverse to the best interests of the gay community.¹¹⁶

The premise of those activists who criticized *The Advocate* should be rejected; recognition of a cause of action for same-sex sexual harassment would not be a civil rights gain for gay people. Instead, recognition of such a cause of action would serve as an additional means for non-gay people to regulate the sexual behavior of gay people.¹¹⁷

This outcome is rooted in the supposedly objective nature of one of the elements of the prima facie claim for hostile environment sexual harassment. *Harris v. Forklift Systems, Inc.*¹¹⁸ established that there is both an objective prong and a subjective prong to the hostile environment sexual harassment claim:

Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment—an environment that a reasonable person would find hostile or abusive—is beyond Title VII's purview. Likewise, if the victim does not subjectively perceive the environment to be abusive, the conduct has not actually altered the conditions of the victim's employment, and there is no Title VII violation.¹¹⁹

In his concurrence in *Harris*, Justice Scalia warned of the danger posed by this "reasonable person" standard in sexual harassment litigation:

As a practical matter, today's holding lets virtually unguided juries decide whether sex-related conduct engaged in (or permitted by) an employer is egregious enough to warrant an award of damages. One might say that

116. See Garry Abrams, *Rough Water Ahead for The Advocate?*, L.A. TIMES, Jan. 28, 1993, § E, at 1 (noting that *The Advocate* was withdrawing its controversial defense "[t]o avert its potentially biggest embarrassment"); *LPI Changes Stance In Same-Sex Harassment Case*, FOLIO, Mar. 15, 1993, at 16 (stating that *The Advocate* "incurred the wrath of many homosexual activists because of the initial stance").

117. See Grose, *supra* note 41, at 377, 397 (arguing against "the natural reaction of feminist, lesbian, queer theory, and progressive legal scholars and advocates . . . to attempt to force same-sex sexual harassment cases into the ambit of Title VII's protection against workplace discrimination" because "[a]llowing the state to regulate same-sex sexual harassment would strengthen the state's power to 'define acceptable sex'").

118. 510 U.S. 17 (1993).

119. *Id.* at 21-22.

what constitutes "negligence" (a traditional jury question) is not much more clear and certain than what constitutes "abusiveness." Perhaps so. But the class of plaintiffs seeking to recover for negligence is limited to those who have suffered harm, whereas under this statute "abusiveness" is to be the test of whether legal harm has been suffered, opening more expansive vistas of litigation.¹²⁰

The danger that Justice Scalia recognized is compounded for the gay civil defendant accused of same-sex sexual harassment because the reasonable person is, in theory and in practice, a non-gay person with a heterosexual world view.¹²¹ After all, the reasonable person standard is nothing more than a means for comparing the collective norm of the jury with the defendant's behavior in question:

The traditional concept of the neutral reasonable person standard . . . reflects a kind of social consensus, 'a personification of a community ideal of reasonable behavior, as determined by the fact finder's social judgment.' As a practical matter, this means that when the trier of fact is a judge, the 'community ideal of reasonable behavior' will be what the judge's own experience reflects, and when the trier of fact is a jury of citizens, reasonableness will reflect a consensus based on the jurors' collective experience and common wisdom. Thus, the reasonable person is the trier of fact, who can only be expected to rely upon his or her own perspective as a participant and representative of the community at large in deciding what is reasonable.¹²²

As such, the reasonable person standard is ideally suited for subordinating sexual minorities who do not conform to the majority's norms.¹²³

Feminist scholars have long argued that the reasonable person standard devalues or ignores altogether the experiences of women, thereby exacerbating gender inequality.¹²⁴ MacKinnon, for example, has theorized that "ordinary" women and "ordinary" men differ with respect to the sexual attitudes and behaviors that they find offensive. The ordinary man might be stimulated by a comment coming from a woman that the ordinary woman

120. *Id.* at 24 (Scalia, J., concurring).

121. See Robert B. Mison, *Homophobia in Manslaughter: The Homosexual Advance as Insufficient Provocation*, 80 CALIF. L. REV. 133, 160 (1992) ("[W]hen the reasonableness standard is blind to sexual orientation, the presumption of sexual identity is almost invariably heterosexual.").

122. Paul B. Johnson, *The Reasonable Woman in Sexual Harassment Law: Progress or Illusion?*, 28 WAKE FOREST L. REV. 619, 636 (1993) (quoting W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 32, at 175 (5th ed. 1984)).

123. See Naomi R. Cahn, Symposium, *The Looseness of Legal Language: The Reasonable Woman Standard in Theory and in Practice*, 77 CORNELL L. REV. 1398, 1431, 1435 (1992) (arguing that while the reasonable person appears to provide a neutral standard, in actuality it incorporates subjective beliefs that subordinate non-dominant groups). See also Johnson, *supra* note 122, at 639 ("'[R]easonableness' aids the legal system in its attempt to reconcile the tension between individual autonomy and community harmony by providing an objective means of superimposing community standards upon individual behavior.") (citing Robert Unikel, *Reasonable Doubts: A Critique of the Reasonable Woman Standard in American Jurisprudence*, 87 N.W.U.L. REV. 326, 329-30 (1992)).

124. See MACKINNON, *supra* note 2, at 144.

would find offensive coming from a man.¹²⁵ For this reason, some commentators have called for the adoption of a corrective “reasonable woman” standard in sexual harassment litigation.¹²⁶

In the sexual harassment context, the argument for the adoption of a “reasonable woman” standard lost much of whatever force it had when Congress amended Title VII in 1991 to provide for a right to a jury trial when the plaintiff seeks compensatory or punitive damages.¹²⁷ The finder of fact who applies the reasonable person standard in Title VII litigation is no longer a federal judge who, given the composition of the federal judiciary, is far more likely to be male than female. Now, a jury consisting of both men and women will apply the standard.¹²⁸ Thus, to the extent that men and women differ in their perception of what behavior is offensive to the reasonable person, the female perspective will be represented on the jury and will be incorporated into the construction of the reasonable person standard.

In contrast, a gay defendant’s fate in a same-sex sexual harassment lawsuit is likely to rest in the hands of a wholly non-gay jury.¹²⁹ Even worse, it is probable that those non-gay jurors will have had little or no exposure to openly gay people. Consequently, those jurors will have a difficult time incorporating the perspective of the gay defendant into their construction of the reasonable person standard, even if they were inclined to consider the gay defendant’s perspective. The social and cultural segregation of gay America from non-gay America, even more than the statistical probability that gay people will be excluded entirely from the jury, makes the plight of the gay sexual harassment defendant qualitatively different from, and more precarious than, that of the female (but non-gay) sexual harassment litigant.

125. *Id.* at 171.

126. *See* *Ellison v. Brady*, 924 F.2d 872, 879 (9th Cir. 1991) (adopting the “reasonable woman” standard in hostile environment sexual harassment litigation).

127. *See* 42 U.S.C. § 1981a(c) (Supp. III 1991).

128. Johnson, *supra* note 122, at 622 (rejecting adoption of a “reasonable woman” standard and arguing, *inter alia*, that most Title VII sexual harassment cases will be tried to a jury consisting of both women and men “and there is no compelling reason to presume that such juries will be incapable of fairly deciding such cases using an objective and gender-neutral standard of reasonableness”); Saba Ashraf, Note, *The Reasonableness of The ‘Reasonable Woman’ Standard: An Evaluation of Its Use In Hostile Environment Sexual Harassment Claims Under Title VII of the Civil Rights Act*, 21 HOFSTRA L. REV. 483, 501 (1992).

129. *See generally* EDWARD O. LAUMANN ET AL., *THE SOCIAL ORGANIZATION OF SEXUALITY: SEXUAL PRACTICES IN THE UNITED STATES* (1994) (analyzing a survey of a representative sample of American adults between the ages of 18 and 60, conducted by the National Opinion Research Center at the University of Chicago, finding that only 2.8% of men and 1.4% of women identify themselves as gay or lesbian).

Rejecting the assertion, by advocates of a "reasonable woman" standard in sexual harassment litigation, that men "systematically ignore the experiences of women,"¹³⁰ one commentator has argued:

[M]ost men spend much of their lives in the company of women, whether mothers, mates, daughters, sisters, friends, teachers, co-workers, or colleagues, and the idea that such relationships are built essentially on dominance, sexual enmity, and the absence of any understanding or appreciation for the experiences of women is patent nonsense.¹³¹

Most non-gay Americans, however, spend little or no time in the company of openly gay people. Moreover, this social and cultural segregation exists precisely because it is desired by much of non-gay America. Indeed, much of non-gay America views the existence of openly gay people in the mainstream of society as a grave threat to the welfare of their (presumably heterosexual) children and to the maintenance of the values and culture they cherish.¹³² Most of what little contact exists between gay and non-gay America, therefore, is based on enmity and misunderstanding.¹³³ Thus, the reasonable person standard is likely to reflect only the mores of the heterosexual community and to ignore the perspective of the gay same-sex sexual harassment defendant.

B. *A Kiss Is Just a Kiss?*

While the reasonable person standard ignores the perspective of alleged harassers who are gay, the standard is not indifferent to the homosexual nature of their alleged acts. Indeed, recognition of a cause of action for same-sex sexual harassment will not, as some suggest, merely apply to gay people the rules by which non-gay people must live.¹³⁴ The non-gay/heterosexual majority is not so willing to allow gay people to live by the rules it

130. See *Ellison*, 924 F.2d at 879.

131. Johnson, *supra* note 122, at 630; Ashraf, *supra* note 128, at 503 ("It bears emphasis that the community which determines the conduct expected of the reasonable person is a community made up of women and men, not just of men.").

132. See Peter Baker, *Gay Newspaper Again Under Fire; Fairfax Board Wants It Less Accessible*, WASH. POST, May 11, 1993, § B, at 1 (county supervisors in a Washington, D.C. suburb call for the removal of the Washington Blade, a newspaper covering issues of particular interest to gay men and lesbians, from the lobbies of county public libraries to prevent children from seeing the publication); Laurie Kellman and Marie Koklanaris, *Fairfax Revives Library Debate Over Gay Paper*, WASH. TIMES, Sept. 29, 1993, § C, at 3 (assistant director of the Office for Intellectual Freedom at the American Library Association stating that the presence of gay and lesbian literature in public libraries is the most frequent target of those who complain about the content of public libraries). See also *In re Doustou*, No. J-32, 113-01 (Va. Juv. & Dom. Rel. Ct. Henrico Co. Mar. 31, 1993) (removing custody of child from lesbian mother and ordering visitation rights "but not in the presence of her lesbian lover to which relationship the child is not to be exposed"), *aff'd*, 249 Va. 410 (1995).

133. See Mison, *supra* note 121, at 162-63, 205-06 (arguing that because anti-gay bias is so widespread, selection of a jury even from a cross-section of the community is likely to result in a "homophobic jury").

134. See *Pritchett v. Sizeler Real Estate Management Co.*, 67 Fair Empl. Prac. Cas. (BNA) 1377, 1379 (E.D. La. 1995) ("To conclude that same gender harassment is not actionable under Title VII is to exempt homosexuals from the very laws that govern the work place conduct of heterosexuals.").

writes for itself, and it is not so willing to live by the rules it imposes on gay people. Because contemporary America is profoundly, unapologetically heterosexual,¹³⁵ recognition of a cause of action for same-sex sexual harassment will result in gays being held to a higher standard of behavior than non-gays.¹³⁶

This argument is not premised on the notion that cultural differences between gay people and non-gay people give rise to divergent conceptions of which sexual comments or behaviors are out of bounds in the work place and, thus, actionable as sexual harassment.¹³⁷ Rather, any given sexual comment or behavior will be judged more harshly by the finder of fact when the claimed victim of alleged harassment is of the same sex as the alleged harasser than when he is of the other sex. This result reflects a common manifestation of heterosexism—an activity that is condoned or even valued when engaged in by a non-gay person is condemned when engaged in by a gay person.¹³⁸ The refusal by non-gay people to recognize same-sex marriage exemplifies this phenomenon.¹³⁹

To appreciate this point, it is helpful to consider the types of behavior that courts have held not to be actionable sexual harassment in the mixed-sex context. In *Weiss v. Coca-Cola Bottling Co. of Chicago*,¹⁴⁰ the plaintiff alleged that her male supervisor “asked her for dates, called her a ‘dumb

135. See RICHARD A. POSNER, *SEX AND REASON* 157 (1992) (stating that the United States “may be the Western nation least tolerant of homosexuals”). See also *id.* at 64 (noting that “[t]he percentage of Americans who believe that sexual relations between two adults of the same sex are ‘always wrong’ has varied only between 70 and 75 percent since 1980”) (citing Tom W. Smith, *The Polls—A Report: The Sexual Revolution?*, 54 PUB. OPINION Q. 415, 424 (1990)).

136. See Mison, *supra* note 121, at 160 (arguing that the reasonable man is “homophobic and heterosexual” and that this influences application of the reasonable man standard in trials that involve the homosexual-advance manslaughter defense). See also *Johnson v. Ramsey County*, 424 N.W.2d 800, 804, 806 (Minn. App. 1988) (resulting in a jury award of \$75,000 for emotional distress, plus \$300,000 in punitive damages, for a male subordinate who was kissed by his male supervisor and subsequently brought a suit for battery; the trial court reduced the punitive damages award to \$50,000).

137. See *Harassment vs. Discrimination: Who's Right?*, PLAIN DEALER, Jan. 17, 1994, § D, at 3 (describing the charge of an Hispanic male student from Washington Heights (New York City) that Swarthmore College's response to the complaint of a white (and non-Hispanic) female fellow student from suburban Michigan that he harassed her demonstrated an intolerance of ethnic, class and cultural differences).

138. See JOHN BOSWELL, *CHRISTIANITY, SOCIAL TOLERANCE, AND HOMOSEXUALITY* 7 (1980) (noting that Western societies have upheld religious strictures which are seen as condemning homosexuality “in their most literal sense as absolutely inviolable while comparable precepts affecting the majority [have been] relaxed or reinterpreted”).

139. See *Shahar v. Bowers*, 70 F.3d 1218, 1219-21 (11th Cir. 1995), *vacated and reh'g en banc granted*, 78 F.3d 499 (1996) (involving an incident in which the Attorney General of Georgia withdrew his offer of employment to a recent law school graduate upon learning of her intent to engage in a Jewish wedding ceremony with another woman and claimed that his action was justified by the need to ensure the proper function of his department); Bruce Fein, *Defending a Sacred Covenant*, LEGAL TIMES, June 17, 1996, at 20 (reporting that in response to concerns that Hawaii might recognize same-sex marriage, Alaska, Arizona, Georgia, Idaho, Kansas, Oklahoma, South Dakota and Utah have enacted laws denying legal recognition to homosexual marriages and “declining respect for the same if legally consummated in a sister state”).

140. 990 F.2d 333 (7th Cir. 1993).

blonde,' put his hand on her shoulder several times, placed signs stating 'I love you' in her work area, and attempted to kiss her in a bar."¹⁴¹ "Taking all of [her] allegations as true, [the Court of Appeals for the Seventh Circuit held that] her claim does not meet the standard for actionable sexual harassment."¹⁴² In general, isolated or infrequent unwelcomed kissing, touching or propositioning will not alone give rise to a cause of action for sexual harassment in the mixed-sex context because such behavior would not interfere with the reasonable person's work performance.¹⁴³

Yet, one should expect that *identical* behavior in a same-sex context would give rise to liability under Title VII for sexual harassment. This expectation arises from repeated experiences with heterosexist intolerance of homosexual displays of affection or sexuality.¹⁴⁴ A recent example of such heterosexist intolerance of homosexuality gained national and international attention last year. On March 6, 1995, Jonathan Schmitz appeared on an episode of "The Jenny Jones Show" that focused on secret admirers. The television show's producers had invited Schmitz to appear on the show to meet his own secret admirer. The secret admirer turned out to be Schmitz's gay neighbor, Scott Amedure. After Amedure revealed his attraction to Schmitz and the viewing audience, Schmitz expressed disinterest and stated that he was "completely heterosexual." Three days later, Schmitz went to Amedure's home and shot him twice with a 12-gauge shotgun, killing him instantly. He then dialed "911" and told the rescue operator that he had just killed a man "because he [expletive]d me on national television."¹⁴⁵

Mr. Schmitz's actions appear to betray his own homophobia.¹⁴⁶ The reactions to the murder by the police and the prosecutor in the county where

¹⁴¹ *Id.* at 337.

¹⁴² *Id.*

¹⁴³ See *Caleshu v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 737 F. Supp. 1070, 1081-83, 1087 (E.D. Mo. 1990) (finding that female plaintiff's allegation that a male co-worker kissed her twice and touched her thigh twice did not allege conduct that would "interfere[] with a reasonable person's work performance"), *aff'd without op.*, 985 F.2d 564 (8th Cir. 1991), *cert. denied*, 504 U.S. 918 (1992); *Ebert v. Lamar Truck Plaza*, 715 F. Supp. 1496, 1498-1500 (D. Colo. 1987) (ruling that the use of vulgar language and occasional "unwelcomed touching" did not establish a sexually hostile work environment), *aff'd*, 878 F.2d 338 (10th Cir. 1989).

¹⁴⁴ For example, four states currently criminalize consensual gay sodomy but have no such proscriptions against consensual heterosexual sodomy. See Ark. Stat. Ann. § 5-14-122 (1995); Kan. Stat. Ann. § 21-3505 (1995); Mo. Rev. Stat. § 566.090(1) (1995); Mont. Code Ann. § 45-2-101 (1995). See also Folsom, *Gays Desecrate 'Loveliest Village'*, MONTGOMERY ADVERTISER, Feb. 13, 1992, § A, at 6 ("To see two male creatures kissing is enough to make any real man or women puke, vomit or gag . . . the city [of Auburn, Alabama, should not have] permitted those abominable creatures [gay people] to parade their disgusting filth.").

¹⁴⁵ For a fuller recitation of the facts surrounding this incident, see Megan Garvey, *The Aftershock of Shock TV*, WASH. POST, Mar. 25, 1995, § D, at 1. Mr. Schmitz has pleaded not guilty to the murder. *Id.*

¹⁴⁶ Mr. Schmitz has admitted that he murdered Amedure but has made clear through his attorney that he holds dear certain moral values: "My client is not a homosexual and takes great offense to

the murder occurred, as well as by the national media, betray systemic heterosexism. The police, the prosecutor, and the media all placed partial blame for the murder at the feet of "The Jenny Jones Show."

The local sheriff remarked that "[i]t's a sad commentary on how individual's lives can be altered by the quest for Nielsen ratings."¹⁴⁷ The prosecutor assigned to the case blamed the murder in part on the television show's humiliation of Mr. Schmitz: "In my view, 'The Jenny Jones Show' ambushed this defendant with humiliation. And in retaliation, this defendant ambushed the victim with a shotgun."¹⁴⁸

Media commentators throughout the nation widely condemned "The Jenny Jones Show" for "humiliating" Schmitz by providing Amedure with a platform from which he could inform Schmitz of his attraction to him.¹⁴⁹ These commentators took for granted that a non-gay man would feel humiliated by another man's attraction to him; unfortunately, the commentators failed to explore the sources or implications of that "natural" humiliation.¹⁵⁰ The media director of the National Gay and Lesbian Task Force was left to theorize:

anyone who says he maintains such a lifestyle." Jennifer Loven, *Talk Show Debate Misses Point*, ROCKY MOUNTAIN NEWS, Apr. 9, 1995, § A, at 3 (quoting Fred Gibson, Mr. Schmitz's attorney).

147. Sheryl McCarthy, *TV's Gutter Talk; Sleaze Takes Terrible Price*, NEWSDAY, Mar. 13, 1995, § A, at 4 (quoting Oakland County (Michigan) Sheriff John Nichols).

148. Sandra Smokes, *Talk Is Cheap, But It Has Consequences*, DENVER POST, Mar. 22, 1995, § B, at 7 (quoting Oakland County (Michigan) prosecutor Richard Thompson).

149. See, e.g., Susan Estrich, *Sick of 'Sick' TV? Turn It Off*, USA TODAY, Mar. 16, 1995, § A, at 11 (arguing that "the producers of Jenny Jones exposed Jonathan Schmitz to public humiliation" and "wronged" him); Rick Kushman, *Talk Shows Thrive on the Art of Public Humiliation*, SACRAMENTO BEE, Mar. 15, 1995, § SC, at 1 (comparing Amedure's revelation to a "punch in the nose" and criticizing the Jenny Jones Show for "ambushing" and "humiliat[ing]" Schmitz); Ben Macintyre, *A Talk Show for Mugs*, TIMES (London), Mar. 21, 1995, Features Section (claiming that Mr. Schmitz "endur[ed] ritual humiliation"); Sheryl McCarthy, *TV's Gutter Talk; Sleaze Takes Terrible Price*, NEWSDAY, Mar. 3, 1995, § A, at 4 (decrying the "reprehensible" "public ambushing of Schmitz" and theorizing that "the whole point in bringing Jonathan Schmitz onto 'The Jenny Jones' show was to embarrass him in front of millions of people"); Howard Rosenberg, *Television: A Compassionate 'Brother's Keeper'*, L.A. TIMES, Mar. 17, 1995, § F, at 1 (asserting that the episode was "an example of rampant misbehavior on the part of daytime television talk shows that play loosely with the lives of some of their guests by seeking to embarrass them with the cameras rolling"); Editorial, *Today's Show: Murder*, PALM BEACH POST, Mar. 14, 1995, § A, at 18 (calling the murder the "inevitable. . . consequence[of] producers and hosts constantly humiliat[ing] the dysfunctional in search of ratings from pathetically bored viewers"); Elwood Watson, *Have Talk Show Situations Gone Too Far?*, BANGOR DAILY NEWS, Mar. 22, 1995 (saying that "critics have denounced Jenny Jones and her staff"); David Tobenkin, *Has Talk Gone Too Far?*, BROADCASTING & CABLE, Mar. 20, 1995, at 22 (reporting that the shooting has prompted debate among stations, station representatives, advertisers, and syndicators over exploitative television); Editorial, *Television's Junk Dealers*, ROCKY MOUNTAIN NEWS, Mar. 22, 1995, § A, at 44 ("Schmitz . . . had the bad luck to appear at a taping of the [show] to meet a 'secret admirer.'").

150. See Anita Creamer, *Gay Attraction Isn't Excuse to Kill*, SACRAMENTO BEE, Mar. 23, 1995, § F, at 1 ("[I]n our concern over the Amedure killing, we've all but ignored one of the most chilling issues: Murder is not an appropriate response to unwanted attention from someone of the same sex."); Letter from Diane Curtis to the Editor, N.Y. TIMES, Mar. 20, 1995, § A, at 16 (responding to an article in the New York Times by asking "[w]hy is it 'humiliating' to be told that someone of the same gender has a crush on you?").

The sole reason that everyone is discussing Schmitz's "humiliation" with such ease is that homophobia is so common in this country as to be considered normal. It does not need to be directly stated; it is just a given that Schmitz would feel humiliated. . . . While the media focus their attention on the excesses of talk shows and the discomfort their guests feel, very little is being said about how Scott Amedure felt as he lay dying.¹⁵¹

The direct relevance of Scott Amedure's murder to a discussion of the reasonable person standard in same-sex sexual harassment litigation is demonstrated by the cases in which a murder defendant asserts the "homosexual advance defense."¹⁵² A killing that otherwise would be murder may be reduced to manslaughter if the defendant can demonstrate that he killed in the heat of passion stoked by an adequate provocation.¹⁵³ An asserted provocation may be found adequate only if it would be sufficient to cause the "reasonable person" to lose his self-control and kill in the heat of passion.¹⁵⁴

Tellingly, triers of fact have found that a reasonable person might have been provoked to kill in response to a homosexual advance.¹⁵⁵ *Schick v. State*¹⁵⁶ is a typical case. In *Schick*, the defendant, Timothy Schick, was charged with murdering Stephen Lamie. Schick confessed to police that he was hitchhiking when Lamie stopped his car to give him a ride. According to the confession, after Schick asked Lamie where he could get a "blow job," Lamie offered to accommodate him personally. Lamie then drove

151. Robin Kane, *Perspective On Homophobia; Hate, Not Humiliation, Is at Fault*, L.A. TIMES, Mar. 16, 1995, § B, at 7. See also David W. Dunlap, *Shameless Homophobia And The 'Jenny Jones' Murder*, N.Y. TIMES, Mar. 19, 1995, § 4, at 16 (While "hands were being wrung about the state of television talk shows . . . the circumstances of the killing seemed almost to be taken for granted, as if there was nothing all that mysterious or confounding about so violent a response to an expression of unrequited affection—man to man."); Jennifer Loven, *Talk Show Debate Misses Point*, ROCKY MOUNTAIN NEWS, Apr. 9, 1995, § A, at 3 (reporting that gay activists argue that "fear and revulsion toward gays . . . got Scott Amedure killed," not "The Jenny Jones Show"); Deb Schwartz, *Who Really Killed Scott Amedure, And Why Are Journalists Protecting Him?*, VILLAGE VOICE, Mar. 28, 1995, at 21 ("By concentrating on the power of the press and the machinations of Schmitz's hetero male psyche, the media managed to skip around the contextual messiness of the murder—homophobia, the prevalence of anti-gay and -lesbian violence, and the easy availability of guns.").

152. See Mison, *supra* note 121, at 147 ("When [a murder victim's] behavior is alleged to be homosexual in character, prevailing cultural climate more than normative and objective elements on which manslaughter theory is dependent affects the ultimate verdict.").

153. See ROLLIN M. PERKINS & RONALD N. BOYCE, CRIMINAL LAW 85 (3d ed. 1982). See also *State v. Flowers*, 574 So. 2d 448, 453 (La. Ct. App. 1991), *cert. denied*, 580 So. 2d 666 (La. 1991) ("Manslaughter is defined in part as a homicide which would be first or second degree murder but the offense is committed in sudden passion or heat of blood immediately caused by provocation sufficient to deprive an average person of his self control and cool reflection.").

154. PERKINS & BOYCE, *supra* note 153, at 98-99.

155. The "homosexual advance" defense is distinct from the "homosexual panic" defense. The latter is an insanity or diminished capacity defense which asserts that the criminal defendant should be absolved of liability because an alleged homosexual advance by the victim purportedly caused the criminal defendant to lose his capacity to distinguish between right and wrong. Mison, *supra* note 121, at 135 n.6.

156. 570 N.E.2d 918 (Ind. Ct. App. 1991).

Schick to a baseball field. After the pair exited the car, Lamie attempted to grab Schick's penis. Schick then beat and kicked Lamie to death and stole his wallet. The jury found Schick not guilty of murder but guilty only of voluntary manslaughter.¹⁵⁷

It is inconceivable that a jury would excuse a man for murdering a woman because the woman offered to perform oral sex on the man and attempted to grab his penis. Indeed, there has never been a case where a heterosexual advance has been used to mitigate murder to manslaughter.¹⁵⁸ One reasonably can infer that the finder of fact in *Schick* found provocation sufficient to cause a reasonable person to lose his self-control and commit homicide, not in the victim's offer to perform oral sex on the defendant or in the victim's attempt to touch the defendant's genitals, but rather in the homosexual nature of those acts. Thus, it should be expected that the finder of fact in a same-sex sexual harassment suit will find "objectively hostile" acts that the reasonable person would not find abusive if performed in the mixed-sex context.¹⁵⁹ Recognition of a cause of action for same-sex sexual harassment under Title VII, therefore, should be understood to be an effective means for the non-gay majority to penalize all types of homosexual erotic or romantic behaviors that would not be penalized in a mixed-sex context.¹⁶⁰

157. *Id.* at 921-22. See also *Mills v. Shepherd*, 445 F. Supp. 1231, 1233-34 (W.D.N.C. 1978) (defendant convicted of manslaughter where defendant pushed the victim out of the victim's car, chased him, knocked him down, kicked him to death and stole his car, ring, watch and bracelet; the jury accepted the defense's contention that the defendant had killed in the heat of passion after being provoked by the victim's grabbing at the defendant's "privates" and "making a 'pass' at him"); *Flowers*, 574 So. 2d at 449-51 (defendant convicted of manslaughter where the victim was stabbed seventeen times and the defendant claimed that the victim had undressed and tried to physically force himself on the defendant); *Wills v. State*, 636 P.2d 372, 373-74 (Okla. Crim. App. 1981) (defendant convicted of manslaughter in the second degree where he kicked to death a man who had made a homosexual advance towards a third party).

158. See *Mison*, *supra* note 121, at 134 n. 4.

159. Cf. Kathryn Abrams, *supra* note 71, at 2515 (attributing the receptivity of courts to claims of gay sexual harassment, "in part to the straight male fear of the spectral homosexual predator").

160. For reasons quite apart from the heterosexist *Harris* reasonable person standard and the economic incentive it would provide to employers to discriminate against gay people, Carolyn Grose has also concluded that recognition of same-sex sexual harassment under Title VII will disadvantage gay people. See Grose, *supra* note 41. Grose's analysis is obverse to my own as it focuses not on the distinction between same-sex and mixed-sex sexual harassment, but rather on the distinction between same-sex harassment that relates to a gay sexual orientation—perhaps better labeled "anti-gay harassment"—and same-sex harassment that does not:

[I]f courts decide to extend Title VII's protection to victims of same-sex sexual harassment, courts will have to ask which kind has occurred: harassment based on sexual orientation or harassment based on gender. Plaintiffs who are gay or appear to be gay will lose because the court will view their harassment as "based on sexual orientation" and therefore not covered by Title VII. Plaintiffs who are straight or appear to be straight will win because the court will view their harassment as "based on gender" and therefore covered by Title VII.

Id. at 388. Thus, Grose concludes:

[A]ny attempt to use Title VII to regulate some same-sex interaction in the workplace will send a dangerous mixed message: it is okay to make a workplace miserable for a dyke or a

IV

A PROPOSAL TO AMELIORATE "REASONABLE HETEROSEXISM,"
GIVEN RECOGNITION OF A CAUSE OF ACTION FOR
SAME-SEX SEXUAL HARASSMENT UNDER
TITLE VII

I have argued that recognition of a cause of action under Title VII for same-sex sexual harassment will unfairly disadvantage gay people because the reasonable person standard, by which allegedly harassing behavior is measured, is heterosexual. As noted in Part II, however, a number of courts already have recognized such a cause of action. Those jurisdictions which allow a claim for same-sex sexual harassment to be brought under Title VII should take steps to minimize the anti-gay effects of the "reasonable heterosexual" standard.

A. *The Futility of Eliminating the Jury*

Until passage of the Civil Rights Act of 1991, which expressly provides that either the plaintiff or the defendant in a Title VII lawsuit may demand a jury trial whenever the plaintiff seeks compensatory or punitive damages,¹⁶¹ a jury trial was not available under Title VII.¹⁶² Title VII itself, as originally enacted, was silent on the issue. However, courts interpreting the Civil Rights Act of 1964 reasoned that there was no right to a jury trial under Title VII because the remedies available to a successful plaintiff—principally back pay and injunctive relief—were equitable in nature, and historically a jury was not available in suits in equity.¹⁶³ A

faggot, or for someone who looks like a dyke or a faggot, but it is not okay to make a workplace miserable for a straight man or woman. That message is unacceptable.

Id. See also *id.* at 385-86 ("Reading [Title VII] to encompass [a cause of action for same-sex sexual harassment] would perpetuate an atmosphere of homophobia in the workplace, while providing no protection for the victims of such an atmosphere.").

Moreover, Grose argues that where the alleged same-sex harasser is gay, courts will presume that the alleged harassment would not have occurred "but for" the sex of the putative victim. Thus, such harassment will be found actionable under Title VII. *Id.* at 391-92, & notes 83-84. Where the alleged same-sex harasser is heterosexual, however, courts will presume that the alleged harassment had nothing to do with the gender of the putative victim. Thus, Title VII will be found not to apply. *Id.* Cf. *McWilliams v. Fairfax County Bd. of Supervisors*, 72 F.3d 1191, 1195 (4th Cir. 1996) (finding no cause of action for same-sex hostile environment harassment exists under Title VII where both the alleged victims and the accused harassers are heterosexual), *cert. denied*, 117 S. Ct. 72 (1996). Grose sums up her fear as follows: "[W]hile a group of straight men who create a sexual environment in the workplace targeting another man are merely boys being boys, gay men who do that would be seen as expressing their sexuality towards that other man, and would therefore be liable for 'but for gender' discrimination." Grose, *supra* note 41, at n.84. Grose concludes that "applying Title VII to cases of same-sex sexual harassment continues to privilege one form of sexuality—heterosexuality—over another—homosexuality." *Id.* at 392.

161. 42 U.S.C. § 1981a(c) (Supp. III 1991).

162. See *Harmon v. May Broad. Co.*, 583 F.2d 410, 410 (8th Cir. 1978); *Slack v. Havens*, 522 F.2d 1091, 1094 (9th Cir. 1975); *EEOC v. Detroit Edison Co.*, 515 F.2d 301, 308-09 (6th Cir. 1975).

163. See *Harmon*, 583 F.2d at 410; *An-Ti Chai v. Michigan Technological Univ.*, 493 F. Supp. 1137, 1144 (W.D. Mich. 1980).

number of commentators have theorized that the courts interpreting Title VII in this fashion were influenced by the fear that the prejudices of jurors would nullify the Civil Rights Act.¹⁶⁴

Removing the objective prong of the *Harris* hostile environment test—whether a reasonable person would find the work environment hostile or abusive—from the jury in same-sex sexual harassment litigation, however, should not be expected to significantly lessen the danger to gay defendants posed by the “reasonable heterosexual” standard. The danger remains because the judiciary is itself a profoundly heterosexual institution.¹⁶⁵

One prominent federal jurist, Judge Posner, has observed “that judges know next to nothing about the subject [of sex] beyond their own personal experience, which is limited, perhaps more so than average, because people with irregular sex lives are pretty much (not entirely, of course) screened

164. See, e.g., Richard L. Neumeir, *Civil Rights Act of 1991: What Does It Do? Is It Retroactive?*, 59 DEF. COUNS. J. 500, 504 (1992); Karen W. Kramer, Note, *Overcoming Higher Hurdles: Shifting the Burden of Proof After Hicks and Ezold*, 63 GEO. WASH. L. REV. 404, 440 n.254 (1995) (asserting that most courts held that there was no right to a jury trial under Title VII partly because the courts believed that all-white juries could confound the purposes of the Title); Note, *Practice and Potential of the Advisory Jury*, 100 HARV. L. REV. 1363, 1374-75 (1987) (“The danger of local community power has explicitly guided interpretation of jury rights under Title VII. . . . Th[e] refusal by federal judges to use jury procedure in Title VII actions has allowed them to insulate the national policy of nondiscrimination from possible nullification by the same local majorities whose discriminatory conduct the Act was designed to prevent.”).

165. See *Bowers v. Hardwick*, 478 U.S. 186, 191 (1986) (finding “[n]o connection between family, marriage, or procreation on the one hand and homosexual activity on the other hand”), *reh’g denied*, 478 U.S. 1039 (1986); *People v. Saldivar*, 497 N.E.2d 1138, 1139 (Ill. 1986) (involving a defendant who contended that he fatally stabbed his gay victim twice in the chest after the victim lured him to his apartment by representing that a party was going on and then made a homosexual advance; the judge, in a bench trial on stipulated facts, handed down a conviction of voluntary manslaughter and a sentence of only seven years of imprisonment); Mison, *supra* note 121, at 162-64 (supporting his argument that judges provide an inadequate safeguard against heterosexual juries precisely because judges also are “susceptible to bias, including homophobia” by citing to several egregiously anti-gay remarks made by judges presiding over anti-gay hate crime murder trials).

See also *Chicoine v. Chicoine*, 479 N.W.2d 891, 896-97 (S.D. 1992). In *Chicoine*, the circuit court had granted visitation rights to a lesbian mother with the restriction that no unrelated female and no gay man could be present during her children’s visits. *Id.* at 892. The children’s father appealed the order to the extent that it allowed unsupervised overnight visits, arguing that his children would be harmed by exposure to the mother’s “homosexual lifestyle.” *Id.* The Supreme Court of South Dakota reversed and remanded with instructions that the trial court order a home study to ensure that the children would not be “placed in an unsafe or unstable environment.” *Id.* at 894.

Justice Henderson wrote a concurrence: “For years, [the lesbian mother at hand] has followed a life of perversion [She] has harmed these children forever. To give her rights of reasonable visitation so that she can teach them to be homosexuals, would be the zenith of poor judgment for the judiciary of this state. Until such time that she can establish, after years of therapy and demonstrated conduct, that she is no longer a lesbian living a life of abomination (see *Leviticus* 18:22), she should be totally estopped from contaminating these children. . . . There appears to be a transitory phenomenon on the American scene that homosexuality is okay. Not so. The Bible decries it. Even the pagan ‘Egyptian Book of the Dead’ bespoke against it.” *Id.* at 896-97 (Henderson, J., concurring and dissenting in part (footnotes omitted)).

out of the judiciary.”¹⁶⁶ Openly gay people have been excluded from the judiciary because of their sexual orientation. The first and still only openly gay person ever appointed to the federal bench was appointed by President Clinton in 1994.¹⁶⁷ Thus, gay defendants in bench trials of same-sex sexual harassment claims still would be likely to have their fate in the hands of finders of fact with little or no exposure to openly gay people and little or no ability or inclination to incorporate the perspective of the gay defendant into their construction of the reasonable person standard.

B. The Limited Usefulness of a “Reasonable Homosexual” Standard

In response to concerns that the facially neutral reasonable person standard in sexual harassment litigation is male-biased, some courts have directed that finders of fact should focus their attention on the perspective of the alleged sexual harassment victim.¹⁶⁸ The leading case advocating this approach is *Ellison v. Brady*.¹⁶⁹ The *Ellison* court instructed that a focus on the victim requires an appreciation of the fact that men and women have different perspectives on arguably objectionable conduct.¹⁷⁰

For example, because women are disproportionately victims of rape and sexual assault, women have a stronger incentive to be concerned with sexual behavior. Women who are victims of mild forms of sexual harassment may understandably worry whether a harasser’s conduct is merely a prelude to violent sexual assault. Men, who are rarely victims of sexual assault,

166. Posner, *supra* note 135, at 1. Judge Posner concludes that the benefits to society that might be derived from anti-gay discrimination would be exceeded by the costs of such discrimination. *Id.* at 307-08. Judge Posner’s analysis, however, epitomizes a heterosexist conception of homosexuality. *See, e.g., id.* at 295 (stating that if homosexuality is chosen “it ought to be repressed as firmly as possible”); 303-09 (explicating his theory of why even absent discrimination “the homosexual lifestyle” will remain “an unhappy one”); 311 (conflating homosexuality and sodomy); 412-13 (proposing, as a safeguard against pedophilia, that any man “not living as part of a heterosexual couple” be forbidden from adopting); 419 (implicitly accepting the premise that preventing children from becoming gay is a worthwhile goal).

167. *See Clinton Picks Tallied, Diversity Cited, FACTS ON FILE WORLD NEWS DIGEST*, Dec. 31, 1994, § C, at 1 (reporting that U.S. District Judge Deborah A. Batts (Southern District of New York), confirmed May 6, 1994, is the first openly gay or lesbian person on the federal bench); Thom Weidlich, *Gay Lawyers Lauded*, *NAT’L L.J.*, Dec. 19, 1994, § A, at 4 (same).

168. *See Ellison v. Brady*, 924 F.2d 872, 879 (9th Cir. 1991); *Yates v. Avco Corp.*, 819 F.2d 630, 637 (6th Cir. 1987) (acknowledging “that men and women are vulnerable in different ways and offended by different behavior;” therefore, a “reasonable person” should be of the same sex as the sexual harassment plaintiff); *Robinson v. Jacksonville Shipyards*, 760 F. Supp. 1486, 1524 (M.D. Fla. 1991); *Jenson v. Eveleth Taconite Co.*, 139 F.R.D. 657, 665 (D. Minn. 1991) (common question of law for Rule 23 class certification purposes is “whether a reasonable woman would find the work environment hostile”); *Spencer v. General Elec. Co.*, 697 F. Supp. 204, 218 (E.D. Va. 1988), *aff’d*, 894 F.2d 651 (4th Cir. 1990); *Radtke v. Everett*, 471 N.W.2d 660, 664 (Mich. Ct. App. 1991) (“a standard which views harassing conduct from the ‘reasonable person’ perspective has the tendency to be male-biased and runs the risk of reinforcing the prevailing level of discrimination which the [Michigan] Civil Rights Act and title VII were designed to eliminate. [Thus, the court] adopt[ed] the ‘reasonable woman’ perspective [in cases with a female plaintiff to] ensure[] a gender-conscious review of sexual harassment”), *aff’d in part, rev’d in part*, 501 N.W.2d 155 (Mich. 1993).

169. 924 F.2d 872 (9th Cir. 1991).

170. *Id.* at 878.

may view sexual conduct in a vacuum without a full appreciation of the social setting of the underlying threat of violence that a woman may perceive.¹⁷¹

Conversely, courts could attempt to overcome the heterosexist bias inherent in the reasonable person standard by directing the trier of fact to focus on the perspective of the gay defendant rather than the putative victim. An approach that focuses on the state of mind of the sexual harassment defendant rather than that of the victim would follow the more traditional use of the reasonable person standard in tort law.¹⁷² For example, the standard in negligence litigation focuses on the perspective of the defendant as the law demands that one who possesses skills or knowledge superior to those of the ordinary person conduct himself in consonance with such skills or knowledge.¹⁷³

Unfortunately, the typical trier of fact would have a difficult time adopting the perspective of the gay defendant in same-sex sexual harassment litigation. The same social and cultural segregation of gay America from non-gay America that originally gives rise, in part, to the heterosexist bias in the reasonable person standard also would make it more difficult for a non-gay fact-finder to understand the perspective of the gay defendant. A similar criticism, stated more strongly, has been made of one rationale for the reasonable woman standard: "if the true nature of sexual harassment can be seen only through the eyes and mind of a reasonable woman, how can a male trier of fact possibly be expected to reach the correct decision through the exercise of his own faculties?"¹⁷⁴

These critics overstate their argument with respect to the reasonable woman standard. Neither the *Ellison* court nor the courts that have followed its lead have ever endorsed the premise that men are incapable of

171. *Id.* at 879.

172. See Johnson, *supra* note 122, at 666-67 ("[T]he question of liability should depend on whether the defendant's conduct was lawful and reasonable. In this respect, the reasonable woman standard is an aberration in the law, for the question of reasonableness has traditionally served as a measure of the defendant's conduct, not the plaintiff's state of mind."). See also *Lipsett v. University of Puerto Rico*, 864 F.2d 881, 898 (1st Cir. 1988) (judging reasonableness from the perspectives of both the putative sexual harassment victim and the accused harasser).

173. See W. PAGE KEETON ET AL., *PROSSER & KEETON ON THE LAW OF TORTS* § 32, at 185 (5th ed. 1984).

174. Johnson, *supra* note 122, at 642, 654 n.139. Johnson himself rejects what he sees as a premise of the reasonable woman standard—that men cannot understand the perspective of a female sexual harassment litigant. See *id.* at 654 n.139. See also *Ellison*, 924 F.2d at 884 (Stephens, J., dissenting) (taking issue with the premise, which was never stated by the majority, that men do not have the capacity to understand women's situation with respect to sexual harassment); Cahn, *supra* note 123, at 1433 (citing *Rabidue v. Osceola Ref. Co.*, 584 F. Supp. 419 (E.D. Mich. 1984)) (relying upon a sexual harassment case where the court found egregiously anti-female alleged harassment not to be actionable as an example of a court's use of the reasonable woman standard in a manner that subordinates woman), *aff'd*, 805 F.2d 611 (6th Cir. 1986), *cert. denied*, 481 U.S. 1041 (1987); Ashraf, *supra* note 128, at 500 ("If male judges are now forced to apply a reasonable woman standard, how can we be so sure that they are now applying a reasonable woman's perception rather than a male-biased view of what the reasonable woman's perception is?").

understanding a female plaintiff's perspective.¹⁷⁵ Their point has been that the legal standard previously did not ask triers of fact, male or female, to try to adopt the perspective of the female sexual harassment victim, and that it would be helpful if they did try. Under the reasonable woman standard, the fact that the plaintiff is a woman is made a relevant part of the total context.¹⁷⁶ *Ellison* merely teaches that the alleged harassing conduct should be considered in light of the characteristics of the recipient of that conduct. The reasonable victim standard merely orients the trier of fact's thinking.¹⁷⁷

In the context of same-sex sexual harassment litigation, however, the argument that the fact finder may be incapable of empathizing with the gay defendant's perspective has more force. As noted above,¹⁷⁸ many non-gay Americans have little exposure to openly gay people. The same cannot be said of men vis-a-vis women. Therefore, the typical (non-gay/heterosexist) fact-finder will be relatively less capable of adopting the perspective of the gay sexual harassment defendant. Nevertheless, to the extent that the "reasonable homosexual defendant" standard can orient the fact-finder's thinking closer towards the gay defendant's perspective, it is better than the status quo.

C. *The Value of a Mixed-Sex Substitution*

Even if a trier of fact was able and willing to focus on the perspective of the gay same-sex sexual harassment defendant, the "reasonable homosexual defendant" standard itself would still have a heterosexual bias to the extent that the conduct of the reasonable gay defendant is measured against the sexual mores of contemporary society. Current sexual harassment law would ensure the survival of this additional heterosexual bias because the law presently directs finders of fact to factor into their reasonable person calculus the heterosexual mores of contemporary American popular culture. For example, in *Baskerville v. Culligan Int'l. Co.*,¹⁷⁹ the Court of Appeals for the Seventh Circuit found that the plaintiff's allegations did not establish a case of actionable hostile environment sexual harassment. The court reviewed nine instances of sexual vulgarity that the plaintiff had alleged her male manager had directed toward her over a seven month period and concluded:

175. See, e.g., *Ellison*, 924 F.2d at 879; *Yates v. Avco Corp.*, 819 F.2d 630, 637 (6th Cir. 1987).

176. See Jolynn Childers, Note, *Is There A Place for A Reasonable Woman In The Law? A Discussion of Recent Developments In Hostile Environment Sexual Harassment*, 42 DUKE L.J. 854, 902 (1993) (arguing for a "reasonable victim" standard that would evaluate the offensiveness of the defendant's alleged conduct from the perspective of the putative "reasonable victim").

177. See Cahn, *supra* note 123, at 1434-35 (conceding that the reasonable woman standard "encourages judges and juries to recognize the impact of different gender ideologies on the actions of women").

178. See *supra* notes 129-33 and accompanying text.

179. 50 F.3d 428 (7th Cir. 1995).

It is no doubt distasteful to a sensitive woman to have such a silly man as one's boss, but only a woman of Victorian delicacy—a woman mysteriously aloof from contemporary American popular culture in all its sex-saturated vulgarity—would find [the supervisor's] patter substantially more distressing than the heat and cigarette smoke of which the plaintiff does not complain.¹⁸⁰

Contemporary American popular culture, however, is “sex-saturated” only with heterosexual vulgarity. Although homosexual vulgarity also flourishes, it does so only in the subculture of gay ghettos. Arguably, part of the reason why homosexual expressions of sexuality do not flourish in popular culture is because there is no mass market for them. Although “sex sells,” homosexual sex does not sell as well to the heterosexual masses who prefer vulgarity of the heterosexual variety. Nevertheless, homosexual expressions of sexuality are largely absent from the popular culture because of heterosexual hostility toward any expression of gay sexuality.¹⁸¹ Therefore, by itself, an instruction to the finder of fact to consider the perspective of the gay same-sex sexual harassment defendant is at best only of limited utility. The fact-finder might easily conclude that no matter how timid the gay defendant's sexual advance, he should have known better: a reasonable gay person would know that homosexuality is not tolerated outside of the gay ghetto.

To help eliminate the heterosexual bias inherent in the *Harris* standard, it would be far more useful to instruct the finder of fact to evaluate the actions of the gay same-sex sexual harassment defendant in the hypothetical context of a mixed-sex interaction. For example, the gay manager who comments on his male subordinate's physical appearance would be judged as though he had commented on the appearance of a female subordinate.

180. *Id.* at 431. See also *Waltman v. International Paper Co.*, 875 F.2d 468, 486 (5th Cir. 1989) (Jones, J., dissenting) (“Depictions [of sex] that were only recently regarded as taboo in movies and television are now de rigueur for programs that even children will watch. . . . Against such trends, it is quaint but also naive to rule that employers are legally required to eradicate all sexual graffiti from their establishments.”); *Rabidue v. Osceola Ref. Co.*, 805 F.2d 611, 622 (6th Cir. 1986) (“The sexually oriented poster displays had a de minimis effect on the plaintiff's work environment when considered in the context of a society that condones and publicly features and commercially exploits open displays of written and pictorial erotica at the newsstands, on prime-time television, at the cinema, and in other public places.”), *aff'd*, 805 F.2d 611 (6th Cir. 1986), *cert. denied*, 481 U.S. 1041 (1987).

181. See Steve Coe, *'Home Improvement' vs. 'Frazier' Possible*, BROADCASTING & CABLE, July 25, 1994, at 19 (reporting that Ted Harbert, president of ABC Entertainment, estimated that the ABC television network suffered “a low six-figure loss” because advertisers withdrew their sponsorship of an episode of the television series “Roseanne” that contained a lesbian kiss); Steve Hochman, *Peppers' Peck Stirs Bushel of Controversy*, L.A. TIMES, Sept. 7, 1995, § F, at 1 (reporting that nearly 100 music stores and media outlets had refused to display the October 1995 issue of “Guitar” magazine because the magazine's cover contained a photo of two male members of the popular band “Red Hot Chili Peppers” kissing each other, and noting that in a recent Gallop poll, 60% of people surveyed stated “that they would be offended by a TV show featuring two people of the same sex kissing romantically”); John Martin, *Being Gay on TV Okay, But Sexuality Isn't*, PROVIDENCE JOURNAL-BULLETIN, Jan. 16, 1996, § F, at 1 (“The pervading message of [network television] is that being homosexual is perfectly acceptable[, however,] there's something inappropriate about showing homosexuals being physical or sexual.”).

Thus, the finder of fact could find a lesbian kiss, a gay caress, or a homosexual expression of attraction to be actionable under Title VII only if their mixed-sex counterparts also would "create an objectively hostile or abusive work environment."¹⁸² Although one can imagine a scenario, such as a restroom encounter, that could not be translated into a heterosexual context without distorting the severity of the harasser's actions, reasonable parallels could be drawn.¹⁸³ With a "mixed sex substitution" instruction, the gay defendant would be judged, at least in theory, under the same rules that the heterosexual majority formulates for itself. Such equal protection under Title VII should give pause to non-gay jurors whose instincts are to proscribe expressions of homosexuality in the workplace, especially because, through *stare decisis*, the non-gay jurors would risk limiting their own social expression.

V

CONCLUSION

Courts should not presently recognize a cause of action under Title VII for same-sex sexual harassment. The language of Title VII does not expressly proscribe such harassment. Nor does the legislative history of the Act indicate that Congress intended to proscribe such conduct.

Sexual harassment of a woman by another woman or of a man by another man does not involve the subjugation of one gender class by a distinct dominant gender class. Thus, same-sex sexual harassment cannot be brought within Title VII's "sex" discrimination prohibition under the inequality theory of discrimination. Moreover, recognition of a cause of action for same-sex sexual harassment under the differences approach would itself perpetuate the social inequality between the dominant heterosexual majority and the subordinate homosexual minority. The reasonable person standard in sexual harassment litigation results in greater liability for alleged sexual harassment in a same-sex context than in a mixed-sex context. This unequal treatment of gay sexuality under sexual harassment law would suppress expressions of gay sexuality directly and indirectly, both inside and outside the work place, by providing a financial incentive to employers to discriminate against gay people on the basis of their sexual orientation.

Therefore, proscription of same-sex sexual harassment should come only after Congress expressly prohibits employment discrimination on the basis of sexual orientation, removing an employer's financial incentive to discriminate on the basis of sexual orientation. In the meantime, the anti-gay effects of the reasonable person standard should be minimized by in-

182. See *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993).

183. A problem less easily overcome is presented by the homophobic finder of fact who is unwilling or unable to draw a heterosexual analogy to homosexual behavior. See Mison, *supra* note 121, at 167 (stating that homophobia may cause juries to disregard instructions from the court).

structing triers of fact that they may find same-sex conduct to be actionable as sexual harassment only if they find that the identical conduct in a mixed-sex context would violate the *Harris* standard.